Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE
SAN JUAN SCHOOL DISTRICT,

Petitioner,

v.

JIMMY SINAJINI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a settlement agreement and consent decree automatically make the plaintiffs prevailing parties under 42 U.S.C. § 1988 merely because the agreement and decree modify the defendant's behavior in ways that benefit the plaintiffs, irrespective of whether the plaintiffs obtained actual relief on the merits of their claims.

PARTIES TO THE PROCEEDINGS

Plaintiffs/Respondents are Jimmy Sinajini, Bill Joe Sinajini, Joe Lee Begay, Herbert Begay, Lena Begay, Cecil Vijil, Shirley Vijil, Clara Lameman, Leona Vijil, Holly Nez, Howard Nez, Hannah Nez, Marion Nez, Gilbert Rockwell, Linda Rockwell, Lena Rockwell, Edith Bigman, Juanita Bigman, Dorothy Bigman, Seth Bigman, Anthony Dee, Gray Dee, Howard Holiday, Peter Holiday, Teddy Holiday, Harold Vijil, Alfred Vijil, Tully Vijil, Ferrell Collins, Sherril Collins, Ilene Collins, Martha Collins, Sarah Billy, Brenda Billy, John Billy, Leroy Atcitty, Patricia Dennison, Tom Dennison, Arlene Dennison, Jimmy Goodman, Jr., Gilbert Goodman, Lucy Goodman, Jimmy Goodman, Elaine Williams, Lorinda Williams, Mary Ann Williams, The Red Mesa Chapter of the Navajo Tribe, The Oljato Chapter of the Navajo Tribe.

Plaintiffs/Intervenors are United States of America, Navajo Nation, Aneth Chapter, Natasha Livingston, Dawny Clark, Nathan Clark, Latoya Clark, Sherrill Clark.

Defendant/Petitioner is the Board of Education of the San Juan School District.

Defendants are David Adams, Maxine Nielson, Harold Lyman, Tom Holiday, Robert Billie, Kenneth Maughan, The San Juan County Commission, Dale Holmes, William G. Dunow, Case E. Broderick, Utah State Board of Education.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The district court's order approving and adopting the 1997 Agreement of Parties and incorporating the agreement into a consent decree is reported at 964 F. Supp. 319. The district court's subsequent decision awarding respondents limited attorney's fees (Appendix ("Pet. App.") 14a-46a) is reported at 47 F. Supp. 2d 1316. The decision of the court of appeals (per McKay, J., joined by Lucero and Murphy, JJ.) reversing (Pet. App. 1a-13a) is reported at 233 F.3d 1236. The order denying the petition for rehearing and rehearing en banc may be found at Pet. App. 47a-48a.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on November 30, 2000, and denied rehearing and rehearing en banc on January 17, 2001. Pet. App. 13a, 47a. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the interpretation of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988(b), which as amended provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681, *et seq.*], the Religious

> Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb, *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d, *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

This petition arises from a dispute over the proper standard to apply when determining whether a voluntary consent decree merits attorney's fees under 42 U.S.C. § 1988.

A. Underlying Litigation

Respondents and petitioner Board of Education of the San Juan County School District ("the District") have long been engaged in litigation over the education of Native American students in a remote area in southern Utah. In 1974, respondents brought a civil rights class action in federal court alleging that the District had denied equal educational opportunities to Native Americans on the basis of race. Pet. App. 3a. In 1975, the parties reached an agreement and entered into a comprehensive consent decree ("1975 Consent Decree"). *Id.*

In 1992, after 17 years of silence, respondents filed a motion in the district court to enforce the 1975 Consent

Decree (hereafter, the "*Sinajini* enforcement action") based on allegations that the District had failed to comply with its obligations under the decree. Pet. App. 3a. The motion also raised numerous allegations and legal issues beyond the scope of the 1975 Consent Decree. *Id.* at 3a-3b. On the District's motions, the district court repeatedly limited the *Sinajini* enforcement action to issues involving compliance with the 1975 Consent Decree, striking those portions of the motion based on allegations or theories that fell outside the decree. *Id.* at 4a.

Respondents then brought two additional lawsuits (the "*Meyers* action" and the "*Chee* action") alleging claims beyond the scope of the 1975 Consent Decree. Pet. App. 4a. The *Meyers* action involved the issue whether the District (as opposed to the Navajo Nation, the Federal government, or the State of Utah) had the sole legal duty to provide educational services to Native American children living on a remote part of a Navajo reservation. *Id.*; *see Meyers v. Bd. of Educ. of San Juan*, 905 F. Supp. 1544 (D. Utah 1995). The *Chee* action involved issues relating to personal injury claims and special education programs for a few Native American children. *See* Pet. App. 4a. After the district court ruled that the District indeed had some duty — shared with the Federal government, the Navajo Nation, and the State of Utah — to educate Native American children on the reservation, the parties agreed to settle the *Meyers* action. *See* 905 F. Supp. 1544. As a result, the District, in cooperation with the State of Utah, the United States government, and the Navajo Nation, constructed a new high school. Since the *Meyers* settlement afforded some of the relief respondents had sought, *see id.*, the District agreed to pay reasonable attorney's fees. Pet. App. 4a.

However, the District adamantly disputed respondents' allegations in the *Sinajini* enforcement action and the separate *Chee* action. *See* Pet. App. 14a-46a. After years of additional litigation, with the parties still far apart on the merits of respondents' claims, both sides agreed to end the court battles, put the past behind them, and work together in a cooperative manner for the benefit of all the District's children. *See Sinajini v. Bd. of Educ. of San Juan*, 964 F. Supp. 319, 320-21 (D. Utah 1997). To that end, in 1997 the parties entered into a settlement agreement ("1997 Agreement") in which they agreed to employ a variety of novel mechanisms to create a new consultative relationship between the Native American community and the District. *Id.*; Pet. App. 4a. This agreement was incorporated into a consent decree ("1997 Consent Decree"). Pet. App. 4a; *see Sinajini*, 964 F. Supp. 319 (text of 1997 Agreement and Consent Decree). By agreement, the 1975 Consent Decree was dissolved and its obligations replaced by those of the 1997 Agreement and Consent Decree, which were substantially less onerous. Pet. App. 4a; *compare*, *Sinajini*, 964 F. Supp. 319 (1997 Agreement and Consent Decree) *with Sinajini v. Board of Educ.*, No. 74-346, 1975 U.S. Dist. Lexis 15526 (D. Utah, October 31, 1975) (1975 Consent Decree).

As part of the settlement, the parties expressly agreed that the District was in no way conceding liability or admitting any of respondents' allegations. *Sinajini*, 964 F. Supp. at 320-21. Both the 1997 Agreement and the 1997 Consent Decree stated that the District "denies any violation of any state or federal law or any wrongdoing" and noted that there had "been no judicial determination" on the merits of plaintiffs' claims or the District's defenses. *Id.* With that critical understanding, the *Sinajini* enforcement action and the *Chee* action were dismissed.

B. Attorney's Fees Litigation Before the District Court.

Respondents later filed an application with the district court for attorney's fees pursuant to 42 U.S.C. § 1988, which the District opposed.[1] In its decision granting only limited fees, the district court first noted that merely "[o]btaining a consent decree, by itself, is not sufficient to confer [prevailing party] status." Pet. App. 25a. Relying on this Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992), the district court reasoned:

> To "prevail" on a civil rights claim, a plaintiff must not only "obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement," but must show that "actual relief on the merits of this claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."

Pet. App. 25a (quoting *Farrar*, 506 U.S. at 111-12). The court underscored that obtaining at least some relief "on the merits" is a prerequisite to attorney's fees:

> "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they

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1. A provision in the 1997 Agreement stated that the parties would negotiate agreements concerning costs and attorney's fees. In the event the parties could not reach an agreement, the right was reserved to apply to the district court for costs and attorney's fees. The parties stipulated that the attorney's fees "provision [in the 1997 Agreement] shall not be viewed as any indication that fees are or are not due in this matter." 964 F. Supp. at 326-27.

> succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, [461 U.S. 424, 433 (1983)]. "[L]iability on the merits and responsibility for fees go hand in hand." *Kentucky v. Graham*, [473 U.S. 159, 165 (1985)]. Therefore, "a civil rights plaintiff must obtain at least some relief on the merits of his claim." *Farrar*, [506 U.S. at 111].

Pet. App. 26a-27a (emphasis omitted).

Since, by express agreement of the parties, the allegations against the District were wholly unresolved, with an express denial of liability on the merits, the district court turned to the Tenth Circuit's two-part catalyst test to determine whether and to what extent respondents could be considered prevailing parties. Pet. App. 27a. Under that test, a plaintiff is required to demonstrate (1) that the lawsuit was a " 'substantial factor' " in securing the relief obtained and (2) that the relief obtained was " 'legally required.' " *Id.* (quoting *Kansas Health Care Ass'n, Inc. v. Kansas Dept. of Social & Rehab. Servs.*, 31 F.3d 1052, 1053 (10th Cir. 1994)). Regarding the second prong, the court stated that "the test is not whether the relief obtained is beneficial to the plaintiffs," but whether it was required by law:

> If it has been judicially determined that defendant's conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.

Pet. App. 40a (quoting *Kansas Health Care Ass'n, Inc.*, 31 F.3d at 1055).

Applying these standards, the court addressed whether respondents prevailed on their claims in the *Sinajini* action to enforce the 1975 consent decree.[2] The focus of the court's inquiry was the extent to which respondents obtained any of the relief they were seeking. The court first observed that fifteen of respondents' 21 distinct claims for relief "were either stricken or abandoned." Pet. App. 30a. Accordingly, the court initially centered its analysis on the six remaining claims. In claim (2), respondents sought an order finding the District in contempt for failure to comply with the 1975 Consent Decree. The district court found that respondents did not prevail on this claim because no such relief was granted; indeed, the 1997 Agreement expressly disclaimed any suggestion that the District was not in total compliance with the 1975 Consent Decree or applicable law. Pet. App. 30a-31a.

In claim (9), respondents asked the court to impose on the District "specific accounting methods and practices to account for all expenditures required by the [1975] Decree." Pet. App. 31a. By contrast, the 1997 Agreement provided that the District would "consider" the joint "recommendations" of two persons (one chosen by the District, the other by respondents) about how to make its

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2. With respect to fees in the separate *Chee* action, the district court (Sam, J.) ruled that respondents would have to seek fees in *Chee* before Judge Jenkins, before whom the *Chee* case had been litigated. Judge Jenkins subsequently considered and rejected the fee application in *Chee*, ruling that respondents were not prevailing parties in that action. On appeal, the court below reversed this decision and remanded with instructions that Judge Sam consider respondents' request for fees in *Chee* together with their request for fees in the *Sinajini* enforcement action. Pet. App. 6a. The District does not seek certiorari on that holding.

financial "records more understandable to the public," but that the District would retain the "sole discretion" to "implement" or reject any such "recommendations." Pet. App. 31a-32a (quoting 1997 Agreement). The district court found that because nothing was legally imposed on the District — any action being left to its "sole discretion" — respondents did not prevail on this claim. *Id.* at 32a. Moreover, the specific expenditure requirements imposed on the District in the 1975 Consent Decree were terminated, not continued. *Id.* at 4a; 964 F. Supp. 319, 320 -27.

In claim (10), respondents asked for an order requiring the District to report on a quarterly basis to the court and various government bodies. Pet. App. 32a. The district court found that respondents did not prevail on this claim because the 1997 Agreement did not require any such reporting nor subject the District to any special monitoring. *Id.* at 33a. Specific reporting requirements and a monitoring regimen had existed under the 1975 Consent Decree but were extinguished when the 1997 Consent Decree came into effect. *See Sinajini*, No. 74-346, 1975 U.S. Dist. Lexis 15526, *25-27.

In claim (12), respondents sought to eliminate the need for negotiation as a prerequisite to court action. In a provision that substantially benefits the District, the 1997 Agreement instead established an extensive dispute resolution mechanism. The court denied prevailing party status on this claim. *Id.* at 33a.

In claim (18), respondents sought the expansion, renovation, and improvement of two secondary schools in the southern part of the school district. The District conceded that the 1997 Agreement provided such relief, which was also relevant to certain provision in the 1975 Consent Decree.

The district court held that respondents prevailed on this claim and fees have been paid in connection therewith. *Id.* at 35a-38a.

In claim (20), respondents sought to force the District to construct an elementary school at Monument Valley, Utah. The 1997 Agreement required only that the District use its "best efforts to obtain funding from Congress and appropriate federal or state agencies" for that end, but specified that the District had no "duty or obligation" to construct the requested school except to the extent such a duty already existed under current law (which was not the case). The court found this was insufficient to alter the parties' legal relationship and thus held that respondents did not prevail on this claim. Pet. App. 33a-34a.

Finally, the district court addressed respondents' claim that they had prevailed by obtaining certain benefits which they had never sought in their pleadings. Pet. App. 38a-41a. To replace the adversarial relationship between the parties with a cooperative approach, the 1997 Agreement established certain committees composed of experts chosen by each side to make recommendations and present educational plans to the District. However, the agreement also provided that the District " 'may reject or approve each committee plan or any part thereof' " and that " '[i]f the [District] rejects a committee plan, or any part thereof, the plan shall not be binding on the District.' " *Id.* at 40a (quoting the 1997 Agreement and Consent Decree). The district court ruled that since the creation of consultative committees was neither requested in their pleadings nor required by law, respondents did not prevail on this claim. *Id.* at 41a. The court also rejected several other theories for attorney's fees which are not at issue here. Pet. App. 42a.-45a.

The district court then awarded respondents limited fees based on their limited success in the *Sinajini* enforcement action. Pet. App. 45a.

C. The Tenth Circuit Reverses the District Court's Ruling on Attorney's Fees, Creating a New Standard

On appeal, the Tenth Circuit reversed on the ground that the district court had applied "an erroneous legal standard" in determining prevailing party status. Pet. App. 6a-7a. The court stated that the district "court erred when it conflated the *Farrar* standard with a more exacting and inapplicable two-part 'catalyst test.' " *Id.* at 7a. The court reasoned that the causation prong of the catalyst test is inapposite because a consent decree always provides the necessary connection between a plaintiff's lawsuit and an eventual change in the defendant's conduct: "The catalyst test bridges a gap that does not exist when a judgment is in effect. A judgment is in effect here, and the catalyst test does not apply." *Id.* at 8a.

The court further reasoned that the catalyst test's second prong — that the relief obtained be "required by law" — was also inapplicable. Instead, paraphrasing an extremely truncated portion of the *Farrar* standard, the court held that the relevant test was simply "whether the 1997 consent decree modified the school district's behavior in . . . ways that benefitted [respondents]" — whether or not such relief was sought by respondents in their pleadings or was in any way required by law. Pet. App. 8a. The court noted, for instance, that "the 1997 decree altered the parties' relationship by creating committees of experts empowered to make recommendations about school district programs," which the court concluded benefitted respondents. *Id.* at 8a-9a. The court instructed the district court to take such

instances into account on remand in determining the extent to which respondents prevailed. *Id.*

The court then remanded with additional instructions on evaluating whether, in the light of its new standard, respondents "obtained excellent results or only limited success." Pet. App. 9a. The Court of Appeals subsequently denied the District's petition for rehearing or rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The Tenth Circuit held that prevailing party status under 42 U.S.C. § 1988 can arise merely because a settlement agreement or consent decree modifies the defendant's behavior in ways that benefit the plaintiff — regardless whether the agreement or decree provides actual relief on the merits of the plaintiff's claims. Pet. App. 8a. This holding directly conflicts with the Court's decisions establishing the applicable standard for determining prevailing party status.

Under traditional practice in American courts, a party seeking relief through the judicial process must pay its own attorney's fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Of course, Congress may abrogate that rule by statute, *id.* at 269, but in the absence of such a statute federal courts have no power to devise their own fee-shifting rules, regardless of how desirable from a policy standpoint the shifting of fees may seem in a particular context. *Id.* The attorney's fees provision in 42 U.S.C. § 1988

is one of a number of examples of statutes by which Congress has modified the traditional American rule in particular contexts.

This Court has held that plaintiffs "prevail" within the meaning of section 1988 when they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This Court has consistently held that a "prevailing" plaintiff is one who advances a meritorious civil rights claim. *See Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (per curiam) (attorney's fees provisions "permit the award of counsel fees *only* to a party who has prevailed on the merits of a claim") (emphasis added); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) ("when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.").

As explained in *Farrar v. Hobby*, 506 U.S. 103, 109-12 (1992), the Court's current rubric for determining prevailing party status evolved out of a trilogy of cases. In *Hewett v. Helms*, 482 U.S. 755 (1987), the Court declared that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail" for purposes of section 1988. *Id.* at 760. In *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam), the Court stated that a judgment "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Id.* at 4. Then, in *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989), the Court synthesized the teachings of *Hewitt* and *Rhodes*. The Court stated that a prevailing party is "one who [1.] has succeeded on any

significant claim [2.] affording it some of the relief sought." *Id.* at 791. "[T]he plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792.

In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court reiterated the two prongs of the prevailing party analysis under section 1988: First, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." *Id.* at 111. Second, "the relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Id.* "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12. This formulation has been the established standard for determining prevailing party status for nearly a decade.

The decision of the court below directly conflicts with the Court's holding in *Farrar*. Though it quoted the *Farrar* standard, as courts typically do when addressing the prevailing party issue, the Tenth Circuit held that the district court abused its discretion when it inquired into whether the relief afforded by the 1997 Agreement and Consent Decree constituted actual relief on the merits of respondents' claims, *i.e.*, whether the relief was in any fashion "required by law." Pet. App. 8a. Discarding *Farrar*'s critical first prong ("actual relief on the merits of [the] claim", 506 U.S. at 111-12), the court remanded with instructions for the district court to consider only "whether the 1997 consent decree modified the school district's behavior in additional ways that benefitted [respondents]" — that is, whether *Farrar*'s second prong alone is met. *Id.* at 8a.

Thus, the court below has held that as long as there is a settlement or consent decree modifying the defendant's behavior in any way that benefits the plaintiff, then it is irrelevant whether the settlement or consent decree was entered into to get rid of frivolous or pointless litigation, whether plaintiff's claims had any merit, whether the outcome agreed to was in any way related to some requirement of federal law, whether the plaintiff requested the relief afforded — or even whether, as here, the parties agreed to put the bitter past behind them, end the legal melee, and work together to achieve a common goal such as the education of children. In short, the Tenth Circuit has held that a settlement or consent decree *automatically* makes a plaintiff a prevailing party, since every settlement can be presumed to benefit the plaintiff in at least some fashion, even if the settlement constitutes little more than tossing a plaintiff the proverbial "bone merely to avoid the expense of defending against an unmeritorious suit." *Brown v. Griggsville Com. Unit School Dist. No. 4*, 12 F.3d 681, 684 (7th Cir. 1993) (Posner, C.J.).

The Court has never gone that far. In *Farrar*, the Court held that securing nominal damages was enough to "materially alter[] the legal relationship between the parties," inasmuch as the judgment "forc[es] the defendant to pay an amount of money he otherwise would not pay." 506 U.S. at 112-13. But that ruling was expressly predicated on the fact that nominal damages cannot be awarded until at least one of the plaintiff's claims is adjudged meritorious; the adjudication vindicates the "*merits* of [the plaintiff's] claim." *Id.* at 111-12 (emphasis added). The Court has never suggested that if the parties agreed to settle such a claim for one dollar, with no admission of liability on the merits, the plaintiff would automatically be considered a prevailing party

for purposes of section 1988 regardless of how frivolous the claim or how disconnected such relief might be from relief actually sought. As Judge Posner has noted, such an approach would be both "odd" and "would be adding injury to injury." *Brown*, 12 F.3d at 684.

Indeed, the Court rejected such a standard in *Farrar*: "to qualify as a prevailing party, a civil rights plaintiff must obtain *at least some relief on the merits of his claim*." 506 U.S. at 111 (emphasis added). To be sure, a settlement or consent decree will often afford "relief on the merits of [a] claim," but that is not always the case and thus cannot merely be presumed under the *Farrar* standard. Otherwise nuisance settlements would always make the plaintiff a prevailing party, a result that surely was never intended by Congress nor endorsed by this Court.

In sum, the Tenth Circuit's approach eviscerates the key inquiry into whether the plaintiff obtained "actual relief on the merits of his claim" and thus conflicts with this Court's holding in *Farrar*.

II. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AS TO WHETHER MERE BENEFIT TO THE PLAINTIFF IS SUFFICIENT TO JUSTIFY AN AWARD OF ATTORNEY'S FEES.

The decision below also conflicts with the decision of the Eighth Circuit in *Warner v. Independent School District No. 625*, 134 F.3d 1333 (8th Cir. 1998). In that case, Warner, the parent of a disabled child, brought an action to recover parent's attorney's fees for allegedly prevailing against the defendant school district in administrative proceedings under the Individuals with Disabilities Education Act ("IDEA"),

20 U.S.C. § 1400, *et seq.* The administrative proceedings involved Warner's challenge to the district's Individual Education Plan ("IEP") for her son. In due process hearings, the state Hearing Review Officer ultimately rejected Warner's IDEA claim, concluding that the district had in fact complied with federal law. 134 F.3d at 1335. Nevertheless, the Hearing Review Officer order the school district to amend the IEP in a variety of ways that significantly benefitted Warner's son. *Id.*

In the subsequent action for attorney's fees, "the district court concluded that Warner 'did not succeed . . . on the actual merits of the claim or the relief sought,' that the School District 'did comply with the IDEA,' and that 'the relief achieved is not mandated by [the] IDEA.' " *Id.* at 1336 (quoting the district court's decision) (ellipses in original). Yet the district court nonetheless "held that Warner was a prevailing party entitled to an award of attorney's fees because the state administrative proceedings had 'resulted in a material alteration of the legal relationship' between the parties" which had benefitted Warner and her son. *Id.*

On appeal the Eighth Circuit reversed. The court (per Loken, J., joined by Reavley, J.) held that although the Hearing Review Officer's order materially altered the legal relationship of the parties to the benefit of Warner (*Farrar*'s second prong), that alone "is not a basis for awarding fees to a plaintiff who did not prevail on the merits of any claim. . . ." *Id.* at 1336. The court considered the fact that Warner's legal action did indeed result in an order that beneficially altered the legal relationship of the parties to be "the standard by which the Court measures how much relief on the merits is sufficient to justify at least a partial fee award," not an independent ground for awarding fees when the plaintiff's claims have failed. *Id.*

In dissent, Judge Gibson disagreed with the majority's reading of *Farrar* and its predecessors and advocated the very standard adopted by the Tenth Circuit below — that a plaintiff is entitled to attorney's fees where the action has resulted in a " 'material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute,' " regardless whether the plaintiff actually prevailed on the merits of any claim. *Id.* at 1339 (Gibson, J., dissenting) (quoting *Garland Independent School Dist.*, 489 U.S. at 789 as quoted in *Farrar*, 506 U.S. at 111).

The decision in *Warner* directly conflicts with the decision below.[3] Contrary to the majority opinion in *Warner*, but consistent with the *Warner* dissent, the court below held that the relevant inquiry is "whether the 1997 consent decree modified the school district's behavior in . . . ways that benefitted [respondents]" — regardless whether there was any legal merit to respondents' claims. Pet. App. 8a. The decision below thus discards the critical antecedent inquiry into whether respondents obtained any relief "on the merits of [their] claim[s]," *Farrar*, 506 U.S. at 111-12, an inquiry which the majority in *Warner* found dispositive.

The decision below also conflicts in principle with the decisions of a number of other circuits requiring that the plaintiff make at least some showing of merit before a claim can serve as the basis for an award of attorney's fees.

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3. It is of course well established that decisions construing the term "prevailing party" under 42 U.S.C. § 1988 "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983). That *Warner* involved fees under the IDEA, 20 U.S.C. § 1415(e)(4)(B), instead of section 1988 does not in any way lessen the conflict.

For instance, in *Morris v. City of West Palm Beach*, 194 F.3d 1203 (11th Cir. 1999), the court reiterated that where there has been no formal judgment on the merits in favor of the plaintiff, the Eleventh Circuit requires that a plaintiff seeking attorney's fees demonstrate *inter alia* that it "had a 'colorable claim' or 'reasonable likelihood of success on the merits.' " *Id.* at 1208 (citations omitted). The plaintiff must show "that the defendant's conduct was required by law, that the defendant's conduct does not constitute a 'nuisance settlement,' or that the plaintiff's suit was neither frivolous, unreasonable, [n]or groundless." *Id.* at 1210 (citations and internal quotation marks omitted). "These different formulations," the court explained, all address the same concern: that plaintiffs should not be deemed to be prevailing parties if their claims are objectively unmeritorious." *Id.*[4]

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4. This inquiry typically occurs under some form of the catalyst test, which has been used to expand liability for attorney's fees in cases where there has been no adjudication on the merits. This Court is currently considering whether federal fee-shifting statutes permit use of the catalyst test to expand liability for attorney's fees. *See Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, No. 99-1848. The court below overruled the district court's use of the Tenth Circuit's catalyst test, which includes a requirement that the relief obtained by "required by law," because it considered that test *too exacting*. Pet. App. 7a, 8a. The court below established a standard in cases involving settlements and voluntary consent decrees that is even more permissive than the liability-expanding catalyst test. Yet, the concern that civil rights plaintiffs not be deemed prevailing parties if their claims are objectively unmeritorious is just as much at issue in the context of settlements and voluntary consent decrees as in other situations where there has been no final adjudication on the merits of the plaintiffs' claims.

Other circuits have similar requirements which preclude prevailing party status on meritless claims. *See, e.g., Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994) (catalyst test requires that "the defendant must not have acted wholly gratuitously, *i.e.*, the plaintiff['s] claim[], if pressed, cannot have been frivolous, unreasonable, or groundless") (internal citations and quotation marks omitted); *Little Rock School Dist. v. Special School Dist. 1*, 17 F.3d 260, 262 (8th Cir. 1994) (where defendant voluntarily provides relief, no fees where relief was "gratuitous," meaning plaintiff's suit was "frivolous, unreasonable, [or] groundless") (internal citations and quotation marks omitted). The decision below creates a rule that allows for automatic recovery of attorney's fees, even if the plaintiff's claims are wholly frivolous, provided that the plaintiff obtains beneficial relief. Such a standard conflicts in principle with the rule in many circuits that meritless claims cannot be the basis of attorney's fees under federal fee-shifting statutes.

III. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW DECIDES THE IMPORTANT FEDERAL QUESTION WHETHER SETTLEMENTS AND VOLUNTARY CONSENT DECREES AUTOMATICALLY GIVE RISE TO PREVAILING PARTY STATUS REGARDLESS OF THE MERIT OF THE CLAIMS OR THE CORRESPONDENCE BETWEEN THE RELIEF SOUGHT AND THE RELIEF OBTAINED.

Although the decision below clearly conflicts with the plain language of the *Farrar* standard, the Court has never directly addressed whether settlements and voluntary consent decrees automatically give rise to prevailing party status regardless of the merit of the plaintiff's claims or the

correspondence between the relief the plaintiff sought and the relief actually obtained. This issue is critically important in institutional reform cases and other civil rights suits where the defendant is willing to make reasonable accommodations and alterations in its programs and procedures, despite not being legally required to do so, in order to put an end to costly and acrimonious litigation and create a win-win situation for all parties.

The present case neatly illustrates the importance of the issue. From the outset the District considered the *Sinajini* enforcement action with its myriad allegations to be wholly without merit, and it was fully prepared to prove as much to the district court. However, when the opportunity arose to end years of litigation and create a more cooperative relationship with respondents and that portion of the Native American community that supported or were sympathetic to respondents' suit, the District took it — not because respondents' claims had any merit but rather because *the District itself* (including all the District's students) stood to benefit tremendously from a cessation of hostilities and greater cooperation. Not the least of the benefits to the District was an end to the perpetual financial drain of the litigation itself, no small consideration in a relatively poor rural school district.

Automatically according prevailing party status to the plaintiff in such win-win situations, merely because the defendant voluntarily entered into a settlement or consent decree which benefits both sides, would arguably deter such beneficial compromises, forcing the parties to waste judicial and client resources on potentially needless litigation. Determining whether such a rule — which the court below has now established in the Tenth Circuit — is consistent

with Congress' intent in enacting section 1988 is of great importance to numerous institutional parties involved in civil rights litigation.

IV. THE DECISION BELOW ERRED IN REVERSING THE DECISION OF THE DISTRICT COURT.

The decision below was also fundamentally in error. As stated in the 1997 Agreement, the District settled not because there was evidence it had broken any law or violated the 1975 Consent Decree, but because the parties mutually "desire[d] to put the litigation behind them" and "work together cooperatively to identify creative and constructive solutions to the educational issues that exist rather than continue the litigation process." *Sinajini*, 964 F. Supp. at 320, ¶ 2 (1997 Agreement). As noted, the parties expressly acknowledged that the "District denies any violation of any state or federal law or any wrongdoing," *id.* at 321, ¶ 5, and in the decree itself the district court stated that "[t]here has been no judicial determination as to the validity of the claims against the District." *Id.* at 320, ¶ 2 (1997 Consent Decree).

As outlined by the district court, *see supra*, with one exception the benefits afforded by the 1997 Agreement were either not sought by the respondents in the enforcement action or were not legally binding on the District. In the one instance where the relief obtained actually corresponded with the relief sought — the requirement to expand and improve two secondary schools — the obligation under the 1997 Agreement was contingent upon the District obtaining funding from outside sources, either the citizens in San Juan County in a special bond election or Congress; failing that, the District's obligation was merely to build what it had money to build after taking care of higher District priorities.

Id. at 322, ¶¶ 12-14. Respondents, by contrast, bound themselves to wait at least 24 months and first to comply with dispute resolution mechanisms before filing another civil rights action in the event financing for the renovations could not be obtained. *Id.* at 322-23, ¶ 14.

The committees of experts which the court below found so significant are actually just advisory bodies which provide the District with ideas and plans for improving education in the District. *Id.* at 324-25, ¶ 31. The District has no legal obligation to accept the advice; discretion remains totally with the District. *Id.* at 325, ¶ 31(e). Rather than saddling the District with a legal duty, therefore, the creation of the committees of experts provides a significant benefit to the District.

Under these circumstances, the district court in no way abused its discretion in limiting the award of attorney's fees incurred in pursuing their only successful claims. 47 F. Supp. at 1328. The district court applied the right standard and reached the correct result. The court below erred in reversing the district court's decision.

V. ALTERNATIVELY, THE COURT SHOULD HOLD THIS CASE PENDING RESOLUTION OF *BUCKHANNON.*

On Sept. 26, 2000, the Court granted certiorari in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, No. 99-1848, on the question whether federal fee-shifting statutes make attorney's fees available when the defendant voluntarily provides the plaintiff with the requested relief without any determination whether the defendant violated federal law.

In addressing that question, the Court will very likely decide whether an award of attorney's fees under federal fee-shifting statutes requires at least some showing that the defendant was in fact in violation of federal law. The answer to that question bears directly on the question presented herein and will almost certainly control the determination of this matter. Accordingly, in the alternative, the District respectfully requests that the Court hold this case pending resolution of *Buckhannon*.

CONCLUSION

For the reasons stated here, petitioner respectfully requests that a writ of certiorari be granted. In the alternative, petitioner respectfully requests that the Court hold this case pending resolution of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, No. 99-1848, which will address the question, also at issue here, whether federal fee-shifting statutes provide for attorney's fees where the defendant voluntarily provides relief to the plaintiff without any determination as to whether the defendant violated federal law.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED NOVEMBER 30, 2000

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 99-4130

JIMMY SINAJINI, BILL JOE SINAJINI, JOE LEE BEGAY, and HERBERT BEGAY, minors, through their parents and/or guardian, LENA BEGAY; CECIL VIJIL, SHIRLEY VIJIL, CLARA LAMEMAN, through their parent and/or guardian, LEONA VIJIL; HOLLY NEZ, HOWARD NEZ, and HANNAH NEZ, minors, through their parent and/or guardian, MARION NEZ; GILBERT ROCKWELL and LINDA ROCKWELL, minors, through their parent and/or guardian, LENA ROCKWELL; EDITH BIGMAN, JUANITA BIGMAN, and DOROTHY BIGMAN, minors, through their parent and/or guardian, SETH BIGMAN; ANTHONY DEE, minor, through his parent and/or guardian, GRAY DEE; HOWARD HOLIDAY and PETER HOLIDAY, minors, through their parent and/or guardian, TEDDY HOLIDAY; HAROLD VIJIL, ALFRED VIJIL, minors, through their parent and/or guardian, TULLY VIJIL; FERRELL COLLINS, SHERRIL COLLINS, and ILENE COLLINS, minors, through their parent and/or guardian, MARTHA COLLINS; SARAH BILLY and BRENDA BILLY, minors, through their parent and/or guardian, JOHN BILLY; LEROY ATCITTY PATRICIA DENNISON, a minor, through her parents TOM DENNISON and ARLENE DENNISON; JIMMY GOODMAN, JR. and GILBERT WOODMAN, minors, through their parents and/or guardians,

Appendix A

LUCY GOODMAN and JIMMY GOODMAN; ELAINE WILLIAMS and LORINDA WILLIAMS, minors, through their parent and/or guardian, MARY ANN WILLIAMS; THE RED MESA CHAPTER OF THE NAVAJO TRIBE; and THE OLJATO CHAPTER OF THE NAVAJO TRIBE,

Plaintiffs-Appellants,

and

UNITED STATES OF AMERICA; NAVAJO NATION, ANETH CHAPTER; NATASHA LIVINGSTON; DAWNY CLARK, NATHAN CLARK, and LATOYA CLARK, minors, through their parent and/or guardian, SHERRILL CLARK,

Plaintiffs-Intervenors,

v.

BOARD OF EDUCATION OF THE SAN JUAN SCHOOL DISTRICT; DAVID ADAMS, MAXINE NIELSON, HAROLD LYMAN, TOM HOLIDAY, and ROBERT BILLIE, all individually and as members of the Board of Education of the San Juan School District; KENNETH MAUGHAN, individually and as Superintendent of the San Juan School District; THE SAN JUAN COUNTY COMMISSION; DALE HOLMES, individually and as Chairman of the San Juan County Commission; WILLIAM G. DUNOW, and CASE E. BRODERICK, individually and as commissioners of the San Juan County Commission; UTAH STATE BOARD OF EDUCATION,

Defendants-Appellees.

Appendix A

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 74-CV-346-S)

* * *

Before **LUCERO, McKAY,** and **MURPHY,** Circuit Judges.

McKAY, Circuit Judge.

This appeal is about the scope and amount of an attorney fee award granted pursuant to 42 U.S.C. § 1988(b). The district court determined that Plaintiffs had partially prevailed in litigating their civil rights claims and awarded a reduced amount of fees and costs. Plaintiffs appeal, contending that the award was unreasonably limited.

In 1974, Appellants brought a class action under 42 U.S.C. § 1983, alleging that the San Juan County School District denied equal educational opportunities to Native Americans on the basis of race. In 1975, the parties reached agreement and entered a comprehensive consent decree. The decree imposed various legal duties upon the school district, including obligations to construct and renovate educational facilities, reimburse parents for travel expenses, operate bus routes, allocate expenditures fairly, and implement bilingual-bicultural awareness programs. *See* Appellees' App. at 7-27.

In 1992, Appellants alleged noncompliance and filed a motion to enforce the decree. Appellants made additional allegations that called into question the school district's duty

to provide educational services for Native Americans living on a remote part of the reservation and also the school district's duty to provide special education programs. The district court limited the immediate proceeding to the enforcement of the 1975 decree, striking multiple paragraphs from Appellants' pleadings that were based on facts outside the scope of the decree. Consequently, in order to litigate all their claims, Appellants maintained this enforcement proceeding, pursued two separate actions, and prepared to intervene in a third discrimination action to be filed by the United States.

In the action concerning the education of children living on a remote part of the reservation, the district court concluded that the school district has a legal duty to provide educational services. *See Meyers v. Bd. of Educ. of San Juan*, 905 F. Supp. 1544, 1578 (D. Utah 1995). Respondents assert in their brief that they agreed to pay $185,000 in fees to Appellants, who "secured essentially the relief they sought" in that litigation. Appellants' Br. at 7. In the action concerning discrimination in special education programs, Appellants voluntarily dismissed their claims because the parties were addressing those issues as part of their comprehensive dispute resolution efforts. *See Chee v. Bd. of Educ. of San Juan*, No. 2:94-CV-0386. The third discrimination action — to be filed by the United States — was contemplated and prepared by Appellants but never filed.

In 1997, dispute resolution efforts culminated in a formal agreement and the district court entered a new consent decree that explicitly superseded the 1975 instrument. *See Sinajini v. Bd. of Educ. of San Juan*, 964 F. Supp. 319, 321 (D. Utah

1997). Appellants, who view the new agreement as an omnibus resolution of their multiple and varied claims, filed an application for fees and costs pursuant to 42 U.S.C. § 1988(b). The district court, relying primarily on the fact that the proceedings had been previously limited to the enforcement of the 1975 decree, granted limited fees and costs. *See Sinajini v. Bd. of Educ. of San Juan*, 47 F. Supp. 2d 1316, 1320-21, 1327-28 (D. Utah 1999). This appeal followed.

Appellants contend that the district court erred by refusing to award fees and costs on multiple claims resolved by the 1997 decree. Title 42 U.S.C. § 1988(b) authorizes reasonable attorney's fees for a prevailing party. "[W]e review an attorney's fee award under 42 U.S.C. § 1988(b) for an abuse of discretion." *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998). In this case, we hold that the district court abused its discretion by limiting the attorney fee award to issues pled when the court had entered judgment on a negotiated settlement that was larger in scope than the pleadings had been. Although the court acknowledged that the resolution of the *Chee* litigation and the anticipated action by the United States were both "subjects of the 1997 Agreement," the court limited the scope of the award to allegations contained in the pleadings and excluded any other issue. *Sinajini*, 47 F. Supp. 2d at 1320-21. This limitation is unreasonable because it belies the nature of the settlement process wherein a party might prevail on claims that were previously stricken. That was the case here.

Although the district court recognized that the *Chee* case was subject to the 1997 decree, the court instructed Appellants

to "file any request for costs and attorney fees incurred in *Chee* with the *Chee* case." *Sinajini*, 47 F. Supp. 2d at 1320-21. The consent decree that the court entered judgment on, however, provided for uniform resolution "concerning costs and attorney[ ] fees in connection with the *Chee* and *Sinajini* litigation and the pending United States' matters." Appellants' App. at 129 n.4. Because the parties had negotiated this arrangement and the court had approved it, we direct the district court on remand to make a uniform resolution on the question of attorney's fees and costs.

In their brief, Appellants suggest that they are entitled to additional fees for having confirmed the holding of the *Meyers* case. We reject this argument summarily because it appears to be made for the first time on appeal and also because the provision in the 1997 decree that addresses fees and costs does not address *Meyers*. We also summarily reject Appellants' assertion that they are entitled to fees for monitoring the enforcement of the new decree. We have reviewed the record and conclude that Appellants have failed to meet their burden of proving that monitoring efforts are necessary. *See Joseph A. v. New Mexico Dep't of Human Servs.*, 28 F.3d 1056, 1060 (10th Cir. 1994).

Whether Appellants prevailed on claims pursued in the enforcement proceeding, in the *Chee* litigation, or on issues contained in the anticipated action by the United States are ultimately mixed questions of law and fact. We review factual findings for clear error, and we review the application of legal standards de novo. *See Robinson v. City of Edmond*, 160 F.3d at 1280 (citing *Jane L. v. Bangerter*, 61 F.3d 1505, 1509 (10th Cir. 1995)). We have reviewed the Order granting

limited attorney fees and costs and conclude that the district court analyzed whether Appellants prevailed under an erroneous legal standard.

The Supreme Court has articulated the applicable legal standard. "In short, a plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). Further, as the district court noted, parties "may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). It is well established that a party may prevail through a settlement embodied in a consent decree. *See Maher v. Gagne*, 448 U.S. 122, 129 (1979). When correctly analyzed under the appropriate legal standard, Appellants prevailed to a greater extent than the district court's Order acknowledged. The court erred when it conflated the *Farrar* standard with a more exacting and inapplicable two-part "catalyst test." *See Sinajini*, 47 F. Supp. 2d at 1322.

The district court stated: "[W]hen there has been no adjudication, the Tenth Circuit applies a two-part catalyst test." *Id.* (quotations omitted). That states the application too broadly. Rather, the Tenth Circuit uses the catalyst test to determine whether a party prevailed when the relief pursued eventuates but there is "no final judicial determination." *See Foremaster v. City of St. George*,

882 F.2d 1485, 1488 (10th Cir. 1989); *see also Beard v. Teska*, 31 F.3d 942, 945 (10th Cir. 1994) (final judgment had been withdrawn). The purpose of the catalyst test is to prove a connection between a lawsuit and an eventual change in a party's conduct in cases where that connection is not proven presumptively by a final judgment. The catalyst test bridges a gap that does not exist when a judgment is in effect. A judgment is in effect here, and the catalyst test does not apply.

Taking the catalyst test out of context, the district court examined whether Appellants' lawsuit (as pled) was causally linked to the relief obtained and whether the school district's conduct under the consent decree would be otherwise required by law.[1] *See Sinajini*, 47 F. Supp. 2d at 1322-27. Using that test, the court determined that Appellants prevailed on only one claim: "for expansion, renovation, and improvement of the two secondary schools . . . ." *Id.* at 1326. That, however, is not the test articulated in *Farrar*. On remand, the district court must reevaluate whether the 1997 consent decree modified the school district's behavior in additional ways that benefitted Appellants.

For example, the 1997 decree altered the parties' relationship by creating committees of experts empowered to make recommendations about school district programs. *See Sinajini*, 47 F. Supp. 2d at 1326-27. The school district accepted formal obligations regarding the free exchange of information and accounting procedures, both of which alter

1. We observe that the district court's interpretation of the catalyst test results in a strict adherence to the language of the pleadings, which interpretation we do not ratify.

the way the parties conduct business. The school district agreed to use their best efforts to obtain funding for construction of an elementary school. Although the school district is not obligated to construct that facility, the parties' relationship has been altered by imposition of an enforceable legal standard, "best efforts." *See Firefighters v. Stotts*, 467 U.S. 561, 574 (1984); *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1513 (10th Cir. 1995). Throughout its brief the school district contends that, notwithstanding such alterations, their behavior is not modified by the decree because they retain the final decision-making authority on questions of district programs. That response does not suffice because the district agreed to alter the processes through which it approaches that decision-making, and such alterations can be material and of benefit to Appellants.

After reconsidering the extent to which Appellants prevailed, the district court must reexamine whether Appellants obtained excellent results or only limited success. When a party has obtained substantial relief, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley*, 461 U.S. at 435. The district court explained that some claims were "not so related to the successful claim that they should be compensable . . . ." *Sinajini*, 47 F. Supp. 2d at 1328. The Supreme Court, however, excluded claims "distinct in all respects from [ ] successful claims." *Hensley*, 461 U.S. at 440. That less restrictive standard must be utilized in determining whether certain claims are unrelated to the pursuit of the ultimate result achieved.

Appendix A

The district court determined that Appellants prevailed on "a significant claim," but concluded that "it was only one of approximately 21 claims for relief, so the plaintiffs achieved only limited success in view of the entire litigation." *Sinajini*, 47 F. Supp. 2d at 1328. However, "[s]uch a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Hensley*, 461 U.S. at 435. Whether a party prevails is ultimately an exercise of judgment that is fundamentally qualitative, not quantitative. *See Jane L. v. Bangerter*, 61 F.3d 1505, 1511 (10th Cir. 1995). Having outlined the appropriate legal standards, we leave that judgment to the district court to exercise in the first instance.

The final step of the analysis requires the district court to determine a lodestar figure by making a calculation of hours reasonably expended. *See Jane L.*, 61 F.3d at 1509-1510. The district court did not calculate a lodestar. Instead, because the district court determined that Appellants had prevailed on one of twenty-one claims, the court awarded Appellants one twenty-first of the total hours worked plus any hours actually spent on that claim. Appellant's App. at 154. When recalculating the award, the court must calculate the hours reasonably expended in light of the results achieved and use that as the lodestar for the final award.

We REVERSE and REMAND for recalculation of attorney's fees and costs.

Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 99-4130

JIMMY SINAJINI, BILL JOE SINAJINI, JOE LEE BEGAY, and HERBERT BEGAY, minors, through their parents and/or guardian, LENA BEGAY; CECIL VIJIL, SHIRLEY VIJIL, CLARA LAMEMAN, through their parent and/or guardian, LEONA VIJIL; HOLLY NEZ, HOWARD NEZ, and HANNAH NEZ, minors, through their parent and/or guardian, MARION NEZ; GILBERT ROCKWELL and LINDA ROCKWELL, minors, through their parent and/or guardian, LENA ROCKWELL; EDITH BIGMAN, JUANITA BIGMAN, and DOROTHY BIGMAN, minors, through their parent and/or guardian, SETH BIGMAN; ANTHONY DEE, minor, through his parent and/or guardian, GRAY DEE; HOWARD HOLIDAY and PETER HOLIDAY, minors, through their parent and/or guardian, TEDDY HOLIDAY; HAROLD VIJIL, ALFRED VIJIL, minors, through their parent and/or guardian, TULLY VIJIL; FERRELL COLLINS, SHERRIL COLLINS, and ILENE COLLINS, minors, through their parent and/or guardian, MARTHA COLLINS; SARAH BILLY and BRENDA BILLY, minors, through their parent and/or guardian, JOHN BILLY; LEROY ATCITTY PATRICIA DENNISON, a minor, through her parents TOM DENNISON and ARLENE DENNISON; JIMMY GOODMAN, JR. and GILBERT WOODMAN, minors, through their parents and/or guardians, LUCY GOODMAN and JIMMY GOODMAN; ELAINE WILLIAMS and LORINDA WILLIAMS, minors, through

their parent and/or guardian, MARY ANN WILLIAMS; THE RED MESA CHAPTER OF THE NAVAJO TRIBE; and THE OLJATO CHAPTER OF THE NAVAJO TRIBE,

Plaintiffs-Appellants,

and

UNITED STATES OF AMERICA; NAVAJO NATION, ANETH CHAPTER; NATASHA LIVINGSTON; DAWNY CLARK, NATHAN CLARK, and LATOYA CLARK, minors, through their parent and/or guardian, SHERRILL CLARK,

Plaintiffs-Intervenors,

v.

BOARD OF EDUCATION OF THE SAN JUAN SCHOOL DISTRICT; DAVID ADAMS, MAXINE NIELSON, HAROLD LYMAN, TOM HOLIDAY, and ROBERT BILLIE, all individually and as members of the Board of Education of the San Juan School District; KENNETH MAUGHAN, individually and as Superintendent of the San Juan School District; THE SAN JUAN COUNTY COMMISSION; DALE HOLMES, individually and as Chairman of the San Juan County Commission; WILLIAM G. DUNOW, and CASE E. BRODERICK, individually and as commissioners of the San Juan County Commission; UTAH STATE BOARD OF EDUCATION,

Defendants-Appellees.

Appendix A

JUDGMENT
Filed November 30, 2000

Before **LUCERO, McKAY,** and **MURPHY,** Circuit Judges.

This case originated in the District of Utah and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the District of Utah for further proceedings in accordance with the opinion of this court.

Entered for the Court
PATRICK FISHER, Clerk

by: s/ Amy Frazier
Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED AND FILED FEBRUARY 5, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 2:74-CV-346S

JIMMY SINAJINI, et al.,

Plaintiffs,

and

THE NAVAJO NATION and THE UNITED STATES OF AMERICA,

Plaintiffs-Intervenors,

vs.

BOARD OF EDUCATION OF THE SAN JUAN SCHOOL DISTRICT, et al.,

Defendants.

UTAH STATE BOARD OF EDUCATION and STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,

Amicus Curiæ.

Appendix B

ORDER

This case came before the court on three related motions. The plaintiffs filed two motions for orders requiring the defendant Board of Education of the San Juan County School District (District) and amicus curiæ the Utah State Board of Education (State Board) to pay plaintiffs' costs and attorney fees pursuant to 42 U.S.C. § 1988(b). The State Board, together with the State Superintendent of Public Instruction, asked the court to consider separately issues of entitlement to fees and reasonableness of the amount requested. In a phone conference with the parties, the court granted the State Board's motion. A hearing on the issue of entitlement was then held on December 15, 1998.

I. Procedural background

In 1974 the plaintiffs, all Native Americans, filed this lawsuit against the District and its members, the State Board and its members, and the State Superintendent of Public Instruction. They alleged that the defendants violated the United States Constitution and various federal laws by (1) expending more funds for construction and operation of schools within the San Juan School District which served non-Native American students than for those which predominantly served Native American students, and (2) failing to provide a bicultural and bilingual education program to benefit non-English speaking Native American students. (*See* Memorandum Decision of May 25, 1995 "1995 Decision" at 2.) The case was certified as a class, with the plaintiffs representing all Native American students in the San Juan School District.

Appendix B

In 1975 the parties stipulated to an agreement which this court, Judge Aldon J. Anderson presiding, incorporated into a consent decree. (*See* file following doc. # 4 & Exhibit G to District's memorandum in opposition.)

The final provision of the 1975 Agreement specified, "The parties shall pay their own costs and attorney's fees." *Id.*, ¶ 53.

More than seventeen years later, the plaintiffs filed a Verified Motion in Supplemental Proceedings, and the Navajo Nation intervened as a plaintiff, alleging that the District had not complied with the 1975 Agreement and Consent Decree. Judge Anderson agreed to reopen the case and assert jurisdiction "for the purposes of enforcing this court's Judgment and Decree adopting the terms of the [1975] Agreement." (Memorandum Decision of May 27, 1993.)

Soon thereafter, the plaintiffs filed a Second Verified Motion in Supplemental Proceedings which addressed particular educational needs of Native American teenagers at Navajo Mountain, Utah. Both motions raised claims and allegations which were not contained in the 1975 Agreement and Consent Decree. Because there had never been an adjudication or admission of any constitutional violation in this case, Judge Anderson determined that modification of the Agreement would not be allowed absent "a clear showing of extraordinary circumstances," which the plaintiffs had not made. (Order Denying Plaintiffs' Motion to Modify of November 30, 1993 at 7; quoting ¶ 47 of Agreement.) Accordingly, those paragraphs which raised claims and allegations beyond the scope of the Agreement and Consent Decree, were stricken from the plaintiffs' motions.

Appendix B

The plaintiffs filed a Third and Fourth Verified Motions in Supplemental Proceedings, and the United States filed a Complaint-in-Intervention. The case was reassigned to Judge David K. Winder.

Agreeing with Judge Anderson's reasoning, Judge Winder refused to consider "any allegations which raise claims or request remedies not contained in either the Agreement or the court's 1975 Decree." 1995 Decision at 6. Accordingly, Judge Winder granted the District's motions to strike various paragraphs in the plaintiffs' Third and Fourth Verified Motions and in the United States' Complaint-in-Intervention. *Id.* at 5-11.

The plaintiffs commenced two new cases against the District, both alleging discriminatory practices against Native American students. *Meyers v. Board of Education of the San Juan School District*, No. 2:93-CV-1080, and *Chee v. Board of Education of the San Juan School District*, No. 2:94-CV-0386. In *Meyers*, the plaintiffs reasserted the new claims they had tried to raise in their Second Verified Motion in Supplemental Proceedings in this case. *See* 1995 Decision at 3 n.2. Judge Winder observed that the plaintiffs could also pursue allegations stricken from their Third Verified Motion by filing a new case or amending their complaint in *Meyers* or *Chee*. *Id.* at 8.[1]

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1. The plaintiffs had sought to consolidate *Meyers* with *Sinajini*, but Judge Anderson found that the cases involved different issues and were at disparate stages in the litigation process. (Order of December 28, 1993.) Similarly, when the plaintiffs sought to consolidate *Chee* with *Sinajini*, Judge Winder denied the request, explaining:

(Cont'd)

Judge Winder distinguished this case from original civil rights actions. *Id.* at 10. He wrote:

> [B]ecause *this is an enforcement proceeding and not an original civil rights action,* the better approach is to limit the United States to arguing about whether the District has or has not complied with its obligations under the "clear and specific" terms of the Agreement and the court's 1975 Decree.
>
> *. . . [T]his case is and always has been about whether the District is complying with the terms of the Agreement and the court's 1975 Decree.*

Id. at 10-11 (emphasis added).

The Fourth Verified Motion alleged for the first time that the State Board had also violated the Agreement and

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(Cont'd)

> *Chee* is a newly filed civil rights case which . . . focuses on the District's alleged racial discrimination in its special education programs. . . . This case, by contrast, is a twenty-year old enforcement proceeding the focus of which is whether the District has complied with the express terms of the Agreement and the court's 1975 Decree.
>
> . . . The court therefore sees no reason to delay resolution of the Plaintiffs' enforcement motions in this case while it waits for the *Chee* litigation to wind its way through the system.

1995 Decision at 13. Judge Winder suggested it might be more appropriate to consolidate *Chee* with *Meyers*. *Id.* at 14.

Consent Decree. *Id.* at 4 n.4. The plaintiffs later filed a Fifth Verified Motion, also directed at the State Board. Judge Winder denied both the Fourth and Fifth Verified Motions on the merits. (*See* Minute Entry of October 31, 1996.)

The *Sinajini* case then languished while the plaintiffs pursued their claims in *Meyers*. On November 22, 1996, the parties reached a settlement in *Meyers*. (*See* Exhibit G to plaintiffs' reply memorandum in response to amicus curiæ.) Later they stipulated to a significant award of costs and attorney fees for the plaintiffs' work in that case. (*See* file doc. # 321 in *Meyers*.)[2]

Returning to *Sinajini*, the plaintiffs filed a Sixth Verified Motion for Supplemental Proceedings and moved for partial summary judgment on their claims that the District had violated paragraphs 19, 31 & 46 of the 1975 Agreement. Their motion for partial summary judgment was denied. (Order of April 24, 1997.)

In 1997 the parties reached a new agreement which was incorporated into a new consent decree.[3] The 1997 Agreement

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2. Plaintiffs ask the court to take judicial notice of the record in *Meyers*. (Reply memorandum in support of second motion for fees at 2 n.1.)

3. Parties to the 1997 Agreement are the District, the State Board, the State Superintendent of Public Instruction, the *Chee* plaintiffs, the *Sinajini* plaintiffs, the Navajo Nation, and the United States. (Paragraph 1.)

The 1997 Agreement and Consent Decree are published in *Sinajini v. Board of Education*, 964 F. Supp. 319 (D. Utah 1997).

explicitly "superseded, dissolved and replaced" the 1975 Agreement. (Paragraph 9.) Its stated purpose was:

> *to resolve the dispute concerning compliance with the 1975 Agreement and related issues,* including paragraphs 11-16 of the United States' Complaint-in- Intervention . . ., the issues raised in the referral dated February 10, 1994 from the Office for Civil Rights . . . to the United States Department of Justice concerning the District's compliance with Title VI of the Civil Rights Act . . ., and the issues raised in the October 31, 1996 letter from the United States Department of Justice to the District.

(Paragraph 5, emphasis added).

The 1997 Agreement reiterated:

> The pending *Sinajini* case was limited to a determination of the District's compliance with the provisions of the [1975 Agre ent].

(Paragraph 4).

The District again denied "any violation of any state or federal law or any wrongdoing as alleged above," and the parties acknowledged "there has been no judicial determination as to the validity of the claims and defenses raised by the parties." (Paragraph 5.)

The plaintiffs voluntarily dismissed their claims in *Chee* and agreed to "stay any further enforcement proceedings"

in *Sinajini* while the parties attempted to resolve their disputes. (Paragraph 10.) The plaintiffs also dismissed their claims against the State Board and its original members, on condition that the State Board and State Superintendent of Public Instruction act as "Amicus Curiæ to the 1997 Agreement." (Paragraph 11.)

The District agreed *inter alia:* (1) to hold a bond election and use some portion of any proceeds to add classroom and library facilities at two high schools in the southern part of the district; (2) to provide appropriate bilingual education; (3) to continue to incorporate a cultural awareness component into its curriculum; (4) to provide a special education program as required by state and federal statutes and regulations, and (5) to administer a curriculum consistent with applicable statutes and regulations. (Paragraphs 12, 17, 23, 24, 28.)

The parties created a Dispute Resolution Team and procedures to follow before taking any court action concerning issues covered by the 1997 Agreement. (Paragraphs 32-34.)

The parties specifically reserved the question of costs and attorney fees.[4]

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4. Paragraph 36 provides:

> The parties shall negotiate agreements concerning costs and attorneys fees in connection with the *Chee* and *Sinajini* litigation and the pending United States' matters . . . If they are unable to reach an agreement, any party

(Cont'd)

Appendix B

II. Scope of the motions

The plaintiffs seek costs and attorney fees in three matters which were subjects of the 1997 Agreement: (1) *Sinajini*; (2) *Chee*; and (3) a lawsuit contemplated but not yet filed by the United States. (Plaintiffs' memorandum in support at 3-5; *see* Consent Decree, ¶¶ 5 & 36.)[5]

As noted above, a motion to consolidate *Chee* with *Sinajini* was denied on May 26, 1995. *Supra*, n.2. *Chee* was pending before Judge Jenkins at the time of its voluntary dismissal. *See* District's memorandum in opposition at 24 n.10. Accordingly, the plaintiffs should file any request for costs and attorney fees incurred in *Chee* with the *Chee* case. It is not properly before this court.

III. Discussion

In their first motion for fees, filed on June 26, 1997, the plaintiffs seek costs and attorney fees incurred up to the date

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(Cont'd)

> may file and serve an appropriate motion for costs and attorneys fees by July 1, 1997, and the matter shall be submitted to the Court for resolution after appropriate briefing and any further proceedings deemed necessary by the Court. This provision shall not be viewed as any indication that fees are or are not due in this matter.

5. Plaintiffs refer to these matters as "three consolidated cases." (Plaintiffs' First Verified Supplemental Fee Application at 1-2.) They have never been consolidated by a judge of this district. Judge Sam's approval of the parties' 1997 Agreement is binding in *Sinajini* but may not be recognized in *Chee* or other matters.

of the 1997 Consent Decree. In their second motion, filed on May 11, 1998, the plaintiffs seek costs and attorney fees subsequently incurred in "monitoring the District's compliance with the [1997] Consent Decree and protecting the interests and benefits bestowed . . . by the agreement and decree." (Plaintiffs' First Verified Supplemental Fee Application at 2.)

In other words, the first motion is for fees incurred in enforcing the 1975 Agreement and Decree; the second motion is for fees incurred in monitoring the 1997 Agreement and Decree.

A. First motion for costs and attorney fees

The District argues that the plaintiffs are not entitled to an award of fees on their first motion for three main reasons: (1) the 1975 Agreement and Consent Decree preclude such an award; (2) the plaintiffs had limited success and failed to prevail in the enforcement proceedings; and (3) the plaintiffs cannot recover for claims contemplated by the United States but never filed. (District's memorandum in opposition at 7-26.) They point out that the plaintiffs did not prevail on the "sole issue before the court" — enforcement of the original consent decree — because that decree was dissolved. *Id.* at 21-23.

The State Board adds that it cannot be held liable for attorney fees because: (1) the 1975 Agreement and Decree contain no terms enforceable against the State; (2) the State Board participated in the enforcement proceedings mostly

as amicus curiæ; and (3) the State Board is immune from damages under the Eleventh Amendment. (Amicus curiæ's memorandum in opposition at 7-19.)

1. Whether the 1975 Agreement and Decree preclude an award under § 1988

Section 1988(b), also known as the "Civil Rights Attorney's Fee Awards Act of 1976," provides:

> In any action or proceeding to enforce [enumerated civil rights statutes], the court, in its discretion, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs . . . .

(1996 amendment, emphasis added).

The plaintiffs argue they "were already prevailing parties in 1975" because they had obtained an enforceable consent decree. (Plaintiffs' memorandum in support at 5-6.) The Fee Awards Act was not passed until a year after the parties signed the 1975 Agreement. *See* Pub. L. 94-559. Nevertheless, the plaintiffs maintain the case was "pending" when the Act passed because the court retained jurisdiction for monitoring and enforcement purposes.

The plaintiffs then cite *INS v. Jean*, 496 U.S. 154 (1990), for the proposition that "the prevailing party status won by civil rights plaintiffs in sustained institutional reform litigation is a one-time threshold determination that carries forward automatically and thus confers continuing prevailing

party status in subsequent post-judgment monitoring and enforcement proceedings." (Letter to court dated February 20, 1998.) They insist "there is no de novo reconsideration of whether plaintiffs 'prevailed' at each separate stage of the proceedings for which they claim entitlement." *Id.* (citing *Jenkins v. Missouri*, 127 F.3d 709 (8th Cir. 1997)).

The plaintiffs ignore a critical distinction. No court has yet found them to be a "prevailing party" at any stage of the proceedings. Obtaining a consent decree, by itself, is not sufficient to confer that status.

To "prevail" on a civil rights claim, a plaintiff must not only "obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement," but must show that "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992).

Even if § 1988(b) could be applied retroactively to services rendered in obtaining a consent decree entered before its effective date, the court declines to determine in 1999 whether the plaintiffs might be considered "prevailing parties" in 1975 when they agreed, "The parties shall pay their own costs and attorney's fees." 1975 Agreement, ¶ 53.

Cases where the plaintiff already had "prevailing party" status in the underlying litigation and then sought an award of costs and fees in supplemental proceedings, are therefore

distinguishable. *E.g.*, *Jenkins*, 127 F.3d at 714-20; *Arvinger v. Mayor & City Council of Baltimore*, 31 F.3d 196 (4th Cir. 1994).

The District points out that a party can waive its statutory entitlement to fees as part of a settlement arrangement. *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 132-133 (10th Cir. 1980). In *Evans*, the waiver of any entitlement under § 1988(b) was limited to "costs and attorney's fees thus far incurred." 475 U.S. at 722 n.5.

Because the fee provision in the 1975 Agreement is not limited, the District argues it precludes an award of costs or fees in the subsequent enforcement action as well. The court disagrees. As explained above, the plaintiffs had no statutory entitlement to waive when the 1975 Agreement was signed. But when the enforcement proceedings were commenced in 1992, the Agreement was not the only basis for a fee award; section 1988(b) had been passed. The parties' contractual fee provision is not a clear and unequivocal waiver of any subsequent statutory entitlement.

Thus, the plaintiffs may be entitled to an award of costs and fees subsequently incurred, if they can show that they prevailed in the enforcement proceedings.

2. Whether the plaintiffs prevailed against the District and to what extent

"Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant

issue in litigation which achieves some of the *benefit the parties sought in bringing suit.*" *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). "*[L]iability on the merits and responsibility for fees go hand in hand.*" *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Therefore, "a civil rights plaintiff must obtain at least some relief *on the merits* of his claim." *Farrar*, 506 U.S. at 111 (emphasis added).

"[W]hen there has been no adjudication," the Tenth Circuit applies a two-part "catalyst test":

> The plaintiff must demonstrate that *his lawsuit is linked causally to the relief obtained*, i.e., the suit must be a "substantial factor or a significant catalyst" in prompting the defendants to act or cease their behavior. He must also demonstrate that the defendant's conduct in response to the lawsuit was required by the Constitution or federal law, i.e., *the defendant's actions must be legally* required.

Kansas Health Care Ass'n, Inc. v. Kansas Dept. of Social & Rehab. Servs., 31 F.3d 1052, 1053 (10th Cir. 1994). *See also Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994); *Foremaster v. City of St. George*, 882 F.2d 1485, 1488 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990).

The plaintiffs' enforcement proceedings in this case were commenced with a Verified Motion in Supplemental Proceedings for Order to Show Cause which sought the following relief:

(1) a finding of exceptional circumstances and appointment of a special master to monitor the District;

(2) an order finding the District in contempt;

(3) monetary sanctions;

(4) an independent audit of the District finances;

(5) an order preserving all District records;

(6) an order placing the District in partial receivership;

(7) amending the Agreement to require such changes as implementation of bilingual and affirmative action programs in hiring teachers and staff;

(8) requiring the expenditure of funds to ensure compliance;

(9) imposing "specific accounting methods and practices";

(10) additional monitoring of the Decree, including quarterly reporting to the court and other parties;

(11) eliminating time limits for objection to reports;

(12) eliminating negotiation as a prerequisite to court action;

(13) "dismantling the dual education system";

(14) enjoining improper expenditure of categorical funds;

(15) providing compensatory educational services;

(16) amending the Agreement to require relatively higher expenditures in southern schools;

(17) amending the Agreement to require construction and improvement of elementary facilities in the south;

(18) amending the Agreement to require expansion, renovation, and improvement of secondary schools in the south;

(19) amending the Agreement to require construction of an elementary school at Navajo Mountain;

(20) amending the Agreement to require construction of an elementary school at Monument Valley; and

(21) amending the Agreement to increase reimbursement to parents for transporting their children.

(Verified Motion, ¶¶ 21(b)-35, Ex. E to District's memorandum in opposition).[6]

The plaintiffs did not prevail on a number of the claims asserted in this first Verified Motion. The court struck certain allegations — corresponding to claims (1), (7), (11), (14), (16), and (19) — as outside the scope of an enforcement

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6. The plaintiffs also requested an award of costs and attorney fees.

proceeding. New claims in their Second, Third and Fourth Verified Motions were likewise stricken, and some were reasserted in *Meyers*. Their Fourth and Fifth Verified Motions were denied on the merits. Their sixth and final Verified Motion sought relief similar to claims 2-4, 6, 8-10, 13, 15, 17-18, and 20. (Sixth Verified Motion, ¶¶ 10(a)-(1), file doc. # 196.)[7]

Some of the remaining claims are mentioned in the 1997 Agreement. Other claims are not mentioned at all, including claims (3), (4), (5), (6), (8), (13), (15), (17) and (21).

Thus, fifteen of these claims for relief were either stricken or abandoned. The remaining six claims are discussed in more detail below.

a. Claim (2): an order finding the District in contempt

The plaintiffs never obtained any order finding the District in contempt. The 1997 Agreement mentions the issue without resolving it:

> The 1997 Agreement and corresponding Order and Consent Decree . . . are intended to resolve the dispute concerning compliance with the 1975 Agreement . . .

---

7. The Sixth Verified Motion also sought: (1) an award of costs and attorney fees; (2) retention of jurisdiction by the court to enforce the 1975 Decree and supplemental orders; (3) certification of a plaintiff class that would include future Native American students; and (4) "other relief as the Court deems just and proper." Paragraphs 10(m)-(p).

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> The District denies any violation of any state or federal law or any wrongdoing as alleged above.
>
> . . . Nothing in this Agreement should be construed as an admission or acknowledgment in any way that the District has not complied with the provisions of the 1975 Agreement and the Consent Decree or that the District is not in compliance with existing state or federal law in any regard.

(Paragraphs 5 & 41.)

Therefore, the plaintiffs did not prevail on this claim.

b. Claim (9): imposition of specific accounting methods and practices

The plaintiffs asked that court to "require specific accounting methods and practices to account for all expenditures required by the Decree." (Verified Motion at 19.) The 1997 Agreement provides:

> ACCOUNTING PROCEDURES AND EXPENDITURES
>
> The District and the parties plaintiff shall each designate one individual to work together in a cooperative effort with the District Business Administrator to make the District's financial information and records more understandable to the public. *The District,* through its Board of Education, *shall consider and, in its sole*

> *discretion, implement* appropriate policies or procedures, consistent with existing state law and regulations, pursuant to the *recommendations that result from this effort.*

(Paragraph 27, emphasis added).

The District retained the "sole discretion" to implement or reject "recommendations" about its accounting policies and procedures. Thus, the plaintiffs did not succeed in having any specific accounting methods or practices imposed on the District as a legal requirement. *See Farrar*, 506 U.S. at 111 (plaintiff "prevails" only when relief on merits of his claim "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff").

c. Claim (10): additional monitoring including quarterly reporting to the court & other parties

The plaintiffs asked for an order requiring the District to report to the following on a quarterly basis: (1) the court; (2) the plaintiffs; (3) the United States Office of Education's Office for Civil Rights; (4) the United States Department of Justice, Civil Rights Division; and (5) the Utah State Office of Education. (Verified Motion at 19-20.)

As to monitoring, the 1997 Agreement provides:

> The State, as Amicus Curiæ, agrees to use reasonable efforts according to applicable law to

> monitor the District's educational efforts in the areas of bilingual education, special education, and curriculum.

(Paragraph 40). This does not require the District to make any additional reports to the court or other parties, nor does it subject the District to any monitoring that is not required by existing state and federal laws.

Because the monitoring relief granted in the 1997 Agreement does not "materially alter the legal relationship between the parties," the plaintiffs did not prevail on this claim.

d. Claim (12): eliminating negotiation as a prerequisite to court action

Rather than eliminating the need for negotiation, the 1997 Agreement established a detailed Dispute Resolution Process. (Paragraphs 32-34.) Any disagreement between the parties must now be submitted in writing to a Dispute Resolution Team before action can be taken in any court. *Id.*

The plaintiffs did not prevail on this claim.

e. Claim (20): construction of an elementary school at Monument Valley

Regarding an elementary school at Monument Valley, the 1997 Agreement provides:

> [T]he parties . . . shall use their best efforts to obtain funding from Congress and appropriate

> federal or state agencies for (1) the construction of an elementary school at Monument Valley sufficient in size to accommodate Arizona and Utah students residing in the Monument Valley/ Oljato areas . . . All parties acknowledge, however, that without substantial financial contributions from the United States, the [Navajo] Nation, or the State of Arizona, . . . the . . . potential elementary facility at Monument Valley shall be designed to accommodate only the Utah student population. . . .
>
> *Nothing in this Agreement shall be construed as imposing any duly or obligation to construct an elementary school at Monument Valley on the District, the State, the Nation, or the United States, that does not exist under current federal, state, or tribal law. . . .*

(Paragraphs 14 & 16, emphasis added).

The District agreed only to seek funds from others for the construction of an elementary school. The 1997 Agreement expressly indicates that it imposes no additional duty on the District to build such a facility.

Again, the plaintiffs did not prevail because the relief they obtained did not materially alter the parties' legal relationship.

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f. Claim (18): expansion, renovation, and improvement of secondary schools in the southern part of the district

The plaintiffs asked the court to amend the 1975 Agreement "to require the District to expand, renovate and improve both secondary schools in the southern portion of the District." (Verified Motion at 22.)

The 1997 Agreement contains some provisions about improvements at these schools. It requires the District to hold a bond election in May 1997. (Paragraph 12.) The District did so, and voters in the district approved the issuance of bonds. In that event, the 1997 Agreement provides:

> If the issuance of bonds is approved in that election, *portions of the proceeds* therefrom *shall be used to add additional permanent classroom facilities at Whitehorse High School: Monument Valley High School shall also be improved by expanding the existing library facilities and adding additional classroom facilities. Nothing in this Agreement shall require the District to use all proceeds* from the May 1997 bond election, if approved, *on projects mentioned herein* or at Navajo Mountain.

(Paragraph 12, emphasis added).

If voters had not approved the issuance of bonds, these building projects would "revert to projects considered from district pay-as-you-go resources" and be "subject to prioritization by the Board and the availability of funds." (Paragraph 13.)

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The District concedes that the plaintiffs obtained the relief they sought on this claim because construction on projects in the south is going forward. The District nevertheless argues that plaintiffs did not prevail on this claim for several reasons. First, the District maintains it already planned to do the projects when funds became available for them. However, no evidence was submitted in support of this self-serving contention.

Second, the District argues that the 1997 Agreement did not alter the legal relationship of the parties on this issue, since the "case was settled without any assurance that the projects would be built." (District's memorandum in opposition at 18.) The District says it did not promise to complete the projects, but only to pursue a bond election. However, the District also promised to use an unidentified "portion" (not all) of the proceeds for improvements at Whitehorse and Monument Valley High Schools if the bonds were approved. (Paragraph 12.)

The District points out that it had already agreed to hold the May 1997 bond election in connection with *Meyers*. But while the District had agreed to hold a bond election, it had not agreed to use any portion of the proceeds for improvements at Whitehorse and Monument Valley High Schools, the relief sought here.[8]

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8. The *Meyers* Agreement, dated November 22, 1996, required the District to use its best efforts in "[c]onducting a bond election in May, 1997, and from the bond issue committing such funds as are necessary to construct the permanent secondary facility at Navajo Mountain to serve grades 9-12." Paragraph 7(a)(1), Ex. G to Plaintiffs' reply memorandum of July 28, 1997.

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Finally, the District argues that to prevail in these enforcement proceedings, the plaintiffs must show that failure to make these improvements at Whitehorse and Monument Valley High Schools, violated the 1975 Agreement. The District admits the 1975 Agreement required construction of the two schools, which was done, but maintains that expansion, renovation, or improvements were not required more than 17 years after their construction.

Again, the court disagrees. Paragraph 17 provides:

> The District shall construct secondary facilities in the Oljato-Monument Valley-Mexican Hat area and in the Montezuma Creek-Aneth-Red Mesa area. The District shall use its best efforts to provide an educational program (consisting of facilities, curriculum and extra curricular activities) at each of the new schools which is of substantially as high quality as the existing secondary programs in the District. *Such facilities shall accomodate,* [sic] *without overcrowding, all students based upon a reasonable projection of student enrollment.*

(1975 Agreement, Ex. A to Plaintiffs' reply memorandum, emphasis added).

Throughout the litigation, the District has maintained that it has complied with all requirements of the 1975 Agreement and Consent Decree. However, it has never filed a motion to dissolve the Decree, based upon an adequate showing of compliance. Judge Anderson even suggested that

the District file such a motion. (Order of November 30, 1993.) Since the Decree remained in force, the District had a continuing obligation to provide "facilities [which] accommodate, without overcrowding, all students." (Paragraph 17.)

Moreover, the claim for improvements at these high schools was never stricken with other allegations found to be beyond the scope of an enforcement proceeding. The court will not dismiss them as irrelevant now that the plaintiffs have obtained relief.

Accordingly, the court finds that the plaintiffs did prevail on their claim for expansion, renovation, and improvement of the two secondary schools in the southern part of the District. (*See* ¶ 30 of first Verified Motion & ¶ 10(l) of Joint Sixth Verified Motion.)

g. Creation of committees of experts

The court will now address the plaintiffs' argument that they obtained an additional benefit in the 1997 Agreement and Consent Decree, which shows they are prevailing parties. The plaintiffs consider the creation of certain committees as one of their greatest achievements in this litigation:

> The [1997] consent decree requires committees of experts to review district programs, make recommendations, and present plans for changes in District programs and services to Native American students. Substantial progress has been made in regards to the work of the committees. . . .

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> Plans and/or recommendations have been submitted by the Finance Committee, the Special Education Committee and the Bilingual Committee, with recommendations from the Curriculum committee to be submitted shortly. *The work of the committees has provided a substantial and significant benefit on behalf of the Native American class of students in this case.*

(Plaintiffs' trial brief at 2, emphasis added.)

The District responds that this benefit does not meet the standard enunciated in *Farrar* or the Tenth Circuit's catalyst test:

> [T]he Plaintiffs did not obtain "comparable relief" through the Decree, that is, they cannot show that the [D]istrict's obligations set forth in the Decree are required by law in response to the Plaintiffs' lawsuit. Rather than ordering the District to take affirmative action that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff," *Farrar*, 506 U.S. at 111-12, the [1997] Decree is nothing more than a statement of the parties' intention to work cooperatively and the process by which such cooperation will take place. Indeed, *while parties are required under the [1997] Decree to work together in various committees, they are not ordered to develop a particular plan or* result. Thus, the committees' work, which Plaintiffs cite

> as positive proof that they have "prevailed." is not binding on the District. *Paragraph 31(e) of the [1997] Decree specifically provides that the "Board may reject or approve each committee plan or any part thereof" and that "If the Board rejects a committee plan, or any part thereof, the plan shall not be binding on the District."*

(District's trial brief at 4, emphasis added.)

The court agrees that the "creation of committees" is not a claim or issue on which the plaintiffs' prevailed for purposes of attorney fees. Such relief was never requested in any of the Verified Motions, although it relates to several of the plaintiffs' claims in this case, including "dismantling the dual education system" (13 above), requiring the expenditure of funds to ensure compliance with the decree (8 above), and implementing bilingual programs (7 above). Nor were committees of experts mentioned in the 1975 Agreement and Decree.

In any event, the test is not whether the relief obtained is beneficial to the plaintiffs:

> If it has been judicially determined that defendant's conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.

Kansas Health Care, 31 F.3d at 1055 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978)).

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The creation of committees was not a legal requirement in this case and cannot be an indication that the plaintiffs prevailed.

h. Standards for the partially prevailing plaintiff

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court addressed the question "whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims." 461 U.S. at 426. The Court held:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Id. at 440.[9]

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9. The *Hensley* standard applies not only to fees generated before a judgment but to those accrued in post-judgment proceedings. *Joseph A. v. Department of Human Servs.*, 28 F.3d 1056, 1060 (10th Cir. 1994).

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These plaintiffs prevailed on their claim for renovation, expansion and improvement of two secondary school facilities, a significant claim. However, it was only one of approximately 21 claims for relief, so the plaintiffs achieved only limited success in view of the entire litigation. Furthermore, the claims on which the plaintiffs failed to prevail are not so related to the successful claim that they should be compensable as well.

The court therefore holds that the plaintiffs are entitled to award against the District of costs and attorney fees incurred in pursuing claim (18) only.

3. Whether the plaintiffs can recover for the United States' contemplated claims

The plaintiffs say the United States contemplated filing a separate action after the court struck various allegations from its Complaint-in-Intervention, and they planned to intervene in the contemplated lawsuit "to protect the benefits they had received in the *Sinajini* consent decree, to expand those benefits by requesting new relief, and to guard against the danger of inconsistent adjudications." (Plaintiffs' memorandum in support at 14.)

Clearly, the plaintiffs did not prevail on allegations which were stricken from this case as outside the scope of an enforcement action. Nor does an intention to pursue those claims in a separate action make them compensable here.

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4. Whether the plaintiffs prevailed against the State Board

The State Board contends there are no terms enforceable against the State in the 1975 Agreement or Decree. Indeed, that is the "law of the case."

The State Board was named a defendant in the original complaint filed in 1974, and the "State defendants" are defined in the 1975 Agreement to include the State Board. (Paragraph 1(u).) However, the only other reference to any of the State defendants is in ¶ 21, where it says the District shall pay certain tuition "subject to approval by the Utah State Board of Education."

Accordingly, Judge Winder denied the plaintiffs' only verified motions in supplemental proceedings which were directed against the State Board. (Minute Entry of October 31, 1996.) "[T]here's nothing in that agreement, of any kind, that the State defendants agree to do anything," Judge Winder commented. The 1975 Agreement simply "doesn't cover the State." (Transcript of hearing held on October 31, 1996, at 6 & 11.)[10]

"[W]here a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against that defendant." *Kentucky v. Graham*, 473 U.S. at 165.

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10. In the 1997 Agreement, the plaintiffs dismissed the State Board as a named defendant in this case, without prejudice, on the condition that it participate in the Agreement as amicus curiæ. (Paragraph 11.)

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The plaintiffs' allegations against the State Board were all denied on the merits, so they are not entitled to a fee award against the State Board.

B. Second motion for costs and attorney fees

The plaintiffs already seek an award for monitoring the 1997 Agreement and Consent Decree.

Under Tenth Circuit precedent, fees for post-judgment monitoring of a consent decree are available to the party that prevailed in the underlying litigation upon a showing that "the effort expended was necessary and the fees requested by plaintiffs are reasonable." *Joseph A. v. New Mexico Dept. of Human Servs.*, 28 F.3d 1056, 1060 (10th Cir. 1994). However, these plaintiffs had limited success in the underlying litigation. They prevailed on only one of 21 claims for relief.

The claim on which they prevailed sought renovation, expansion, and improvement of two secondary schools in the southern part of the district. It does not appear that the plaintiffs' monitoring activities are in any way related to that claim. *See Ass'n for Retarded Citizens of North Dakota v. Schafer*, 83 F.3d 1008, 1011 (8th Cir.), *cert. denied*, 117 S.Ct. 482 (1996) (plaintiffs must prevail on unrelated claims to be entitled to fee award for post-judgment work).

The 1997 Agreement and Consent Decree contemplate that future disputes between the parties be resolved through a Dispute Resolution Process involving a Dispute Resolution Team. (Paragraphs 32-34.) Only when those procedures have

been exhausted will the parties take action in any court "concerning any issue which is the subject of this Agreement." (Paragraph 34.) The parties also provided for continuing dialog among committees of experts appointed by the parties and for "continuing cooperation" in implementing the terms of the Agreement. (Paragraphs 31 & 35-38.) The plaintiffs' request that attorneys be compensated for monitoring compliance with the Agreement does not seem reasonable or necessary in these circumstances.

Thus, the plaintiffs are not entitled to fees for monitoring the 1997 Agreement and Consent Decree.

IV. Order

The plaintiffs' first motion for costs and attorney fees is granted in part and denied in part as provided in this order. The plaintiffs' second motion for costs and attorney fees is denied.

The plaintiffs are directed to submit detailed records of costs and fees they incurred in pursuing and prevailing on claim (18): the claim for renovation, expansion, and improvements to the two secondary high schools in the southern part of the district. All submissions to the court must be supported by affidavit to which the District is directed to respond if there is any opposition. The court will then decide whether a hearing is necessary to determine what award would be reasonable.

Appendix B

DATED this 5th day of February, 1999.

BY THE COURT:

s/ David Sam
David Sam
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 17, 2001

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 99-4130

JIMMY SINAJINI, et al.,

Plaintiff-Appellant,

and

UNITED STATES OF AMERICA;
NAVAJO NATION, et al.,

Plaintiffs-Intervenors,

v.

BOARD OF EDUCATION OF THE SAN JUAN SCHOOL DISTRICT,

Defendant-Appellee.

ORDER

Filed January 17, 2001

Before **LUCERO, McKAY,** and **MURPHY,** Circuit Judges.

Appendix C

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ Amy Frazier
Deputy Clerk

(2)

Supreme Court, U.S.
FILED
MAY 17 2001
OFFICE OF THE CLERK

No. 00-1596

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE
SAN JUAN SCHOOL DISTRICT,

Petitioner,

v.

JIMMY SINAJINI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Respondents object to Petitioner's framing of the Question Presented. *See* Petition For A Writ Of Certiorari (hereinafter "Petition"), at pg. i; *see also* S. Ct. R. at 15(2). The properly stated Question Presented is:

To award attorneys fees under 42 U.S.C. § 1988, should the catalyst test be applied to a consent decree that on its face determines plaintiff's prevailing-party status?

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STATEMENT OF THE CASE

Petitioner, Board of Education of the San Juan County School District (hereinafter "District"), seeks review of the Tenth Circuit Court of Appeals' decision in *Sinajini v. Bd. of Educ. of San Juan School Dist.*, 233 F.3d 1236 (10th Cir. 2000). The District's Statement of the Case is not entirely accurate or complete. Some allegations, while accurate, are not relevant to consideration of the question properly presented. S. Ct. R. 14(1)(g). Respondents (hereinafter "Plaintiffs") present a simple straight forward history of this twenty-seven and a half year old litigation.

A. Underlying Litigation

This case was filed as a class action in 1974 alleging that the San Juan County School District denied equal educational opportunities to Native American children in San Juan County, Utah, in violation of the constitution, and applicable statutes and regulations. *Sinajini v. Bd. of Educ. of San Juan School Dist.*, 233 F.3d 1236, 1239 (10th Cir. 2000). In 1975 a Consent Decree was entered pursuant to an Agreement of Parties. *Id.* The 1975 Consent Decree required extensive school construction on the Navajo Reservation, equity in school-financing, and the implementation of educational programs and services beneficial to Native Americans. *Id.*

In 1992, Plaintiffs initiated supplemental proceedings to enforce the 1975 Consent Decree and to raise new issues. The new issues involved alleged racial discrimination and deprivation of equal educational opportunities in a variety of school programs and services, and sought new school construction. The United States District Court, District of

Utah (hereinafter "District Court") limited *Sinajini* to enforcement of the 1975 Consent Decree and struck the new issues raised by Plaintiffs, and by intervenors, the United States of America and the Navajo Nation. *Id.* The District Court ruled that certain issues were beyond the scope of the enforcement of the 1975 Consent Decree and Agreement of Parties. *Id.*

In order to litigate all claims, Plaintiffs maintained *Sinajini* as an enforcement action, filed two separate additional lawsuits, and prepared to intervene in a third discrimination suit to be filed by the United States. *See Sinajini*, 233 F.3d 1236, 1239. One of these cases is *Chee v. Bd. of Educ.*, 2001 WL 109155 (10th Cir. 2001) (special education), the other is the United States matter (school desegregation). In still another case filed by individual plaintiffs, the United States, and the Navajo Nation, Plaintiffs also prevailed when the District Court ruled that the District has a legal duty to provide educational services to Native American children in the context of building a high school on the Navajo Reservation. *Id.*; *see also Meyers v. Bd. of Educ. of San Juan*, 905 F. Supp. 1544, 1578 (D. Utah 1995).

In 1997, the parties resolved the *Sinajini* litigation, *Chee*, and the United States matter. The cases were combined in an omnibus settlement under the rubric of *Sinajini*. *See Sinajini v. Board of Education*, 964 F. Supp. 319 (D. Utah 1997). It is the construction and effect of the 1997 Order and Consent Decree and 1997 Agreement of Parties (hereinafter "Consent Decree") that is at the core of the fee litigation and Petitioners' Petition For A Writ of Certiorari.[1] *Sinajini v. Bd. of Educ. of the San Juan County School Distr.*, 964 F. Supp. 319 (D. Utah 1997).

1. The Consent Decree is not found in Petitioners' Appendix. Accordingly, Respondents' provide this Court with the Consent Decree. *See* Res. App., attached hereto as Appendix A.

B. Attorney Fees Litigation

Following entry of the 1997 Consent Decree, Plaintiffs sought to recover their attorney fees and costs. Plaintiffs and Respondents herein set forth a simple straight forward history of the fee litigation.[2]

The fee litigation was resolved favorably to Plaintiffs when the District Court determined that Plaintiffs were prevailing parties, albeit on only one limited issue. Accordingly, the District Court granted only limited fees and was reversed by the Tenth Circuit Court of Appeals. *Sinajini v. Bd. of Educ. of San Juan*, 47 F. Supp. 2d 1316 (D. Utah 1999), *rev'd*, 233 F.3d 1236 (10th Cir. 2000).[3] The Court of Appeals also denied the District's Petition for Rehearing or Rehearing En Banc. Pet. App. C, 47a, 48a.

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2. The District's statement of the fee litigation does not contain a concise description of facts material to consideration of the Question Presented, properly framed. *See* S. Ct. R. 14(1)(g). Much of Petitioners' recitation of the litigation for fees is simply legal argument rather than a procedural history.

3. The District Court ruled that fees in *Chee v. Board of Education* could not be pursued in *Sinajini*, but should instead be determined solely in *Chee*. Plaintiffs filed an application in the District Court in *Chee*, which was denied. *Chee* was then appealed separately to the Tenth Circuit Court of Appeals. While the appeal was pending, the Tenth Circuit Court of Appeals in *Sinajini* ruled that fees for *Chee* must be decided in *Sinajini*. *See Sinajini*, 233 F.3d 1236, 1240 (10th Cir. 2000). Accordingly, the Court of Appeals dismissed the *Chee* appeal as moot and remanded *Chee* to the District Court with instructions to vacate its judgment. *Id.*, *see also Chee*, 2001 WL 109155 (10th Cir. 2001).

REASONS FOR DENYING THE WRIT

I. THE DISTRICT REQUEST FOR REVIEW IS BASED ON A FAULTY PREMISE.

The District's request for review is based on a faulty premise. The District argues the catalyst test, a method used to determine whether a party prevails for purposes of awarding fees under 42 U.S.C. § 1988 in cases that end without judgment, must be used in cases which are resolved pursuant to a consent decree. *See* Petition, at 11-23. Based upon this erroneous premise, the District argues the Tenth Circuit Court of Appeals's opinion in *Sinajini* conflicts with a case from this Court and decisions of other courts of appeal. *Id.*

Under the catalyst test, fees are recovered in cases where a defendant's voluntary action gives plaintiffs the remedy they sought prior to a judgment or settlement. *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987). The circuits have defined the catalyst test in different ways. The lack of a uniform definition is evident in the Tenth Circuit. Apparently, the circuit panels agree that the test applies when the relief pursued is obtained without the entry of a final judicial determination. *Sinajini*, 233 F.3d 1236 (citing *Beard v. Teska*, 31 F.3d 942, 945 (10th Cir. 1994)); *see also Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978) (formulating the "*Nadeau* Test").

The *Nadeau* Test has been adopted in the Tenth Circuit. *J&J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1472-1473 (10th Cir. 1985). *Nadeau* uses a two-part analysis. *Id.* at 1475. "[I]n order to be a 'prevailing party' the plaintiff must show (1) that his action is causally linked to the relief obtained and (2) the defendant's conduct in response to the

lawsuit was required by § 1983." *Id.* The court determined that the "causal connection turns on the provocative role of the plaintiff's lawsuit" in acting as a substantial factor or significant catalyst in motivating the defendants to end their unconstitutional behavior. *Id.* Second, the court must address the strength of plaintiff's fee-generating claim. *Nadeau* at 279.

In *Kansas Health Care v. Department of Social & Rehabilitative Servs.*, 31 F.3d 1052 (10th Cir. 1994), the Tenth Circuit Court of Appeals construed the second *Nadeau* prong to mean that plaintiff must show defendant's favorable conduct, taken in response to the suit, was "required" by law. However, another panel relied upon the more traditional *Nadeau* requirement that plaintiff need only show his suit was not frivolous or groundless. *Beard v. Teska*, 31 F.3d at 952. Still another panel used both ways to employ *Nadeau's* second prong by holding that plaintiff must show that defendant's response was required by law rather than a gratuitous response to a frivolous or groundless action. *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1194 (10th Cir. 1998). Although arguably there may be a conflict in the *definition* of the catalyst test, this is irrelevant because the catalyst test does not apply to this case.

II. THE TENTH CIRCUIT COURT OF APPEALS PROPERLY HELD THE CATALYST TEST CANNOT BE APPLIED TO A CONSENT DECREE THAT IS AN ENFORCEABLE JUDGMENT.

A. The Tenth Circuit Court Of Appeals Holding Complies With Supreme Court Precedent.

The Tenth Circuit Court of Appeals held that the catalyst test did not apply to this case. *Sinajini*, 233 F.3d 1236, 1241. However, the Court did not invent a "new standard" which

contradicts precedent set forth by this Court or other circuit courts. On the contrary, the Tenth Circuit Court of Appeals held that the catalyst test cannot be applied to a consent decree that is an enforceable judgment and which on its face alters the relationship of the parties by modifying a defendant's behavior in a way that directly benefits plaintiffs. *Sinajini*, 233 F.3d 1236, 1240-41. This ruling follows *Farrar*, which states:

> Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a *consent decree* or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party. In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 103, 111-12 (1992) (citations omitted) (emphasis added).

It is apparent that the Tenth Circuit Court of Appeals made no "new standard" as the District argues. The Tenth Circuit Court of Appeals did nothing more than apply the *Farrar* standards which are specifically applicable to consent decrees. *See id.*

The Court employed the correct procedure contemplated by *Farrar*, reviewed the *Sinajini* Consent Decree and determined that Plaintiffs had prevailed to a greater extent than the District Court had acknowledged. *Sinajini*, 233 F.3d 1236, 1240.[4]

B. The Plaintiffs' Were The Prevailing Party Under the *Farrar* Standards.

The District asserts the catalyst test must be used, even though *Sinajini* was settled with an enforceable permanent injunction which on its face altered the relationship of the parties by modifying defendant's behavior in a way that directly benefitted Plaintiffs and the class of Native American students. *See Sinajini*, 233 F.3d at 1241. Both the District Court and the Tenth Circuit Court of Appeals found Plaintiffs to be the "prevailing party." *Id.* The Tenth Circuit Court of Appeals provided some examples of how Plaintiffs benefitted from the wide-ranging decree and came within the *Farrar* standards.[5] *See Farrar v. Hobby*, 506 U.S. 103 (1992). Since

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4. Even assuming a misapplication of *Farrar*, this alone would not constitute sufficient grounds to grant certiorari. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is *rarely granted* when the asserted error consists of. . . . the misapplication of a properly stated rule of law.") (emphasis added).

5. Plaintiffs prevailed when the decree altered the parties relationship in empowering committees of experts to make recommendations about school programs, the District accepted formal obligations to provide information and accounting procedures and the District agreed to use its "best efforts" to construct an elementary school. *Sinajini*, 233 F.3d at 1241. In addition, the Tenth Circuit Court of Appeals acknowledged that the District Court concluded Plaintiffs prevailed by making the District undertake school construction. *Id.* at 1241-42, *see also Sinajini*, 47 F. Supp. 2d at 1318.

these examples were not intended to be exhaustive, the case was remanded to determine the extent to which plaintiffs prevailed. *Sinajini*, 233 F.3d at 1235, 1242; *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 186 (2000) (district court must address in the first instance any request for costs including fees). It is beyond question that there are substantial successes that benefit Plaintiffs and the class as a result of this comprehensive decree:

1. ¶ 14 (*Sinajini* Agreement, 964 F. Supp. 319, 322): Best efforts to construct the Monument Valley Elementary School. *See Sinajini*, 233 F.3d at 1241.

2. ¶ 14, *Sinajini* Agreement, at 322: Best efforts to construct additional classroom space at Navajo Mountain High School.

3. ¶ 14, *Sinajini* Agreement, at 322: Best efforts to develop a sufficient water source for Navajo Mountain High School.

4. ¶ 14, *Sinajini* Agreement, at 322: Best efforts to continue to operate Mexican Hat Elementary School if the Monument Valley Elementary School is constructed.

5. ¶ 20, *Sinajini* Agreement, at 323: Best efforts to recruit, hire, train and retain teachers and aides certified for bilingual education.

6. ¶ 28, *Sinajini* Agreement, at 324: The District "shall use its best efforts to provide equal access to educational services and courses that are substantially similar, considering the unique circumstances of each District facility and individual community needs."

7. ¶ 31(c), *Sinajini* Agreement, at 325: Best efforts to be used by each committee of experts to complete committee plans for the improvement of educational programs. *Sinajini*, 233 F.3d at 1241.

8. ¶ 37, *Sinajini* Agreement, at 327: Best efforts to provide plaintiffs with compliance information. *Id.*

9. ¶ 2, *Sinajini* Agreement, at 320: The District and other parties shall work together cooperatively and act reasonably in solving education problems.

10. ¶ 3, *Sinajini* Decree, at 320: Injunction entered regarding violations of equal protection, statutes, and regulations. Equal educational opportunities have always been the heart of the case.

11. ¶ 4, *Sinajini* Decree, at 320: The overall Agreement itself operates as an injunction regarding District conduct.

12. ¶ 6, *Sinajini* Agreement, at 321: Retention of jurisdiction by this Court until maintenance of a system of equal educational opportunity for a period of time that will allow the Court to determine it will continue.

13. ¶ 17, *Sinajini* Agreement, at 323: The District shall provide a bilingual program "as required by applicable statutes and regulations."

14. ¶ 23, *Sinajini* Agreement, at 324: The District shall implement a Cultural Awareness Program and develop a plan.

15. ¶ 24, *Sinajini* Agreement, at 324: The District shall provide a special education program "as required by applicable state and federal statutes and regulations."

16. ¶ 27, *Sinajini* Agreement, at 324: Formal obligations regarding accounting procedures. *See Sinajini*, 233 F.3d at 1241.

17. ¶ 28, *Sinajini* Agreement, at 324: The District shall provide and administer an educational curriculum "consistent with applicable statutes and regulations."

18. ¶ 28, *Sinajini* Agreement, at 324: "The District shall make educational programs available so that all students are offered an equal educational opportunity."

19. ¶31(f), *Sinajini* Agreement, at 325: Committee plans for educational reform and improvement "shall comply with all applicable laws."

20. ¶ 5 *Sinajini* Agreement, at 320: The Court's retention of jurisdiction to monitor and enforce the Agreement ensures that the benefits bestowed upon the children in the class will continue to be received by the students far into the future.

21. ¶ 6, *Sinajini* Agreement, at 320: Class action certification extends the relief granted by the Consent Decree to a large class of present and future Native American children.

22. ¶ 9, *Sinajini* Agreement, at 321: The 1997 Consent Decree changed an antiquated and outdated 1975 Agreement and Decree and beneficially restructured the overall relationship of the District and its Native American students.

23. ¶ 12, *Sinajini* Agreement, at 322: The school construction ordered to be undertaken by the District has been determined by the District Court, *Sinajini*, 47 F. Supp. 2d

1316, 1328, and by the Tenth Circuit Court of Appeals, *Sinajini*, 233 F.3d 1236, 1241-1242, to be a "significant claim" for fee purposes.

24. ¶ 15, *Sinajini* Agreement, at 323: The Navajo Tribe agrees to use "best efforts" to provide electrical power at two schools with large numbers of Native Americans, Mexican Hat Elementary School and the prospective Monument Valley Elementary School.

25. ¶ 31, *Sinajini* Agreement, at 324-325: The Consent Decree created committees of experts empowered to make recommendations about District programs. The Tenth Circuit Court of Appeals held that this provision, among others, altered the parties' relationships because the District agreed to change the process through which it approaches decision-making and such alterations will be material and of benefit to the plaintiffs. *Sinajini*, 233 F.3d 1236, 1240.

26. ¶¶ 32-34, *Sinajini* Agreement, at 325-326: The dispute resolution process alters the District's methods of doing business, restructures the parties' relationships, and provides the children with a special access to the District and the ability to beneficially influence District programs and services.

27. ¶ 40, *Sinajini* Agreement, at 327: The State of Utah will use "reasonable efforts" to monitor the District's bilingual, special education, and curriculum programs, further ensuring that the children, and future generations of students as well, will continue to get the benefits of the Consent Decree.

Despite these impressive accomplishments, the District argues in its Petition that the Tenth Circuit Court of Appeals found the Consent Decree "automatically" gives rise to a

prevailing-party status. *See* Petition at pg. 10, 14. This is alleged to be inimical to Section 1988.[6] However, the Court made no such determination. If there had been an automatic assumption of prevailing-party status, the Court would have said so and let it go at that. But, the Tenth Circuit Court of Appeals actually tested the Consent Decree by comparing it to this Court's prevailing-party standards. *Sinajini*, 233 F.3d 1236, 1240 (citing *Farrar*, 506 U.S. at 111-12; *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983): *Maher v. Gagne*, 448 U.S. 122, 129 (1979)). Under this process, a review of the judgment demonstrates that Plaintiffs succeeded in altering the relationship of the parties by modifying the District's behavior in ways that directly benefitted Plaintiffs. *Sinajini* at 1241-42. The Tenth Circuit Court of Appeals held that Plaintiffs had in fact prevailed to a greater extent than the District Court had acknowledged.

6. For example, the District argues that the Tenth Circuit Court of Appeals has created a "new standard," one that "automatically" bestows prevailing-party status, for purposes of § 1988, to plaintiffs who obtain a "nuisance settlement," "regardless of the merit of plaintiff's claims or the correspondence between the relief sought and the relief obtained." *See* Petition at 18-20. The District argues this "new standard" will "deter beneficial compromises, forcing the parties to waste judicial and client resources on potentially needless litigation." *Id.* Such an argument completely misstates the Tenth Circuit Court of Appeals holding in *Sinajini*, 233 F.3d at 1236. The Court specifically held that the District Court must "reconsider[] the *extent* to which Appellants prevailed," and must "reexamine whether Appellants obtained excellent results or only limited success." *Id.* at 1241. Moreover, the standards described by this Court in *Farrar v. Hobby, Hensley v. Eckerhart, Maher v. Gagne,* and discussed herein *infra,* provide ample process to safeguard against the problems raised by the District. The true concern in this regard, however, is the deterrent effect to plaintiffs of denying fee awards in cases resolved by consent decree. *See City of Riverside v. Rivera,* 477 U.S. 561, 577 (1986) (plurality opinion) ("the function of an award of attorney's fees is to encourage the bringing of meritorious civil right claims.")

Id. at 1240. Since the District Court had applied incorrect standards, and flawed the process in other ways,[7] the Tenth Circuit Court of Appeals properly remanded the case. *Sinajini*, 233 F.3d 1236, 1242.

C. There Is No Conflict With Other Circuits.

Cases from other circuits which are purportedly in conflict with the Tenth Circuit Court of Appeals's decision in *Sinajini* actually present no conflict at all when the question of law is *correctly* stated. The issue in this case is whether the catalyst test applies to a consent decree that, on its face, alters the parties' relationship by modifying defendant's behavior in a way that directly benefits the plaintiff. *Farrar*, 506 U.S. at 111-12. On this question, there is no convincing authority that employs the catalyst test (or refuses to use the test) to determine fees when the litigation is resolved by a consent decree and permanent injunction that determines the extent to which a party prevailed. Indeed, courts are admonished not to use the catalyst test where there is a consent decree. *See, e.g., Kilgore v. City of Pasadena*, 53 F.3d 1007, 1011 (9th Cir. 1995).

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7. "The District Court abused its discretion by excluding from the fee award determination, issues that had been stricken from the lawsuit but which were included in the settlement and entered as a judgment approved by the Court." *Sinajini*, 233 F.3d at 1239-1240. The Court improperly excluded from consideration fees associated with *Chee v. Bd. of Education*. *Id.* at 1240. And, the District Court improperly held that Plaintiffs achieved only limited success by applying a formula which viewed the lawsuit as a series of discrete claims rather than focusing on the significance of the overall relief obtained by Plaintiffs. *Id.* at 1242. In rejecting this approach, the Court of Appeals ruled that "[w]hether a party prevails is ultimately an exercise of judgment that is fundamentally qualitative, not quantitative." *Id.*

The cases the District argues are in conflict with *Sinajini* are completely inapposite to this case. In none of the cases cited by the District did the plaintiff obtain a judgment. Thus, fees were appropriately argued pursuant to the catalyst theory. In *Warner v. Independent School District No. 625*, 134 F.3d 1333 (8th Cir. 1998), the plaintiff lost on the merits of the federal claims, and only obtained relief on a state-law claim. Fees were denied because of the complete lack of success on the federal claims. In *Morris v. City of West Palm Beach*, 194 F.3d 1203 (11th Cir. 1999), the plaintiff lost on the merits, but the fee decision was reversed because it did not properly apply the catalyst test. In *Morris*, the Eleventh Circuit used the catalyst test "[b]ecause Appellants did not receive a favorable judgment on the merits or entry of a consent decree or settlement." *Id.* at 1205. Similarly, *Blakenship v. Shalala*, 35 F.3d 273 (7th Cir. 1994) was dismissed as moot and no judgment entered for plaintiffs when the defendants reinstated an old administrative rule making plaintiffs eligible for Medicaid benefits. In that instance, the court determined the catalyst test applied. *Id.* at 276. In *Little Rock School District v. Pulaski County Special School District, # 1*, 17 F.3d 260 (8th Cir. 1994), the defendants voluntarily implemented the relief requested by plaintiff, making the case moot. No judgment was entered in favor of plaintiff, making the award of fees under the catalyst theory appropriate. *Id.* at 262. Given the state of the law, there is no conflict between *Sinajini* and other circuits.

The District argues the Tenth Circuit Court of Appeals "discarded" *Farrar*'s first prong which requires "actual relief on the merits." *See* Petition at 13; *see Farrar*, 506 U.S. at 111-12. This argument clearly misstates the Tenth Circuit Court of Appeals and misquotes *Farrar*. In *Farrar*, this Court held, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim."

Farrar, 506 U.S. at 573 (citations omitted) (emphasis added). "The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *or comparable relief through a consent decree or settlement.*" *Id.* Thus, a consent decree equals "relief on the merits." *Id.*; *see Sinajini*, 233 F.3d 1236, 1241.

In *Sinajini*, many of Plaintiffs' claims that were previously stricken were included in the Consent Decree and should, therefore, be accounted for in the prevailing-party equation. *Id.* at 1236, 1239-40. Plaintiffs prevailed on these multiple and varied claims because they were ultimately reduced to an enforceable judgment. *Id.* at 1240. Thus, the extent of relief on Plaintiffs' claims can be determined by reviewing the Consent Decree itself. It does not need to be accomplished by trial. *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980) (per curiam).[8]

The Tenth Circuit Court of Appeals simply recognized that a consent decree is part of the prevailing party equation. On remand, the Tenth Circuit Court of Appeals instructed the District Court to "reconsider" the extent of Plaintiff's success and "reevaluate" whether the Consent Decree "modified the school district's behavior in additional ways that benefitted Appellants." *Sinajini*. 233 F.3d at 1241. This follows *Farrar*. The District's argument, that it settled

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8. In *Hanrahan*, this Court carefully examined the legislative history of § 1988 and quoted from H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976) that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.' " *Id.* at 756-57. The Court, in examining the Senate history of the attorneys fee act, S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), explained that parties can prevail through a consent judgment. *Id.* at 757.

the case to get rid of a frivolous suit, that it denies all wrongdoing, that it was compelled to do nothing more than what it would have done in any event, that plaintiffs' claims had no merit, and that the outcome was not related to some requirement of federal law, are disingenuous and completely irrelevant to the specific issues. Indeed, the Tenth Circuit Court of Appeals specifically noted "Appellants (respondents herein) prevailed to a greater extent than the district court's Order acknowledged." *Sinajini*, 233 F.3d at 1240. In addition, the District's contention that the "benefits afforded by the 1997 Agreement were . . . not sought by respondent's" is similarly inaccurate. *See* Petition at 21. The relief sought by Plaintiffs was in fact incorporated in the Consent Decree. *See Sinajini* at 1239-40. However, the District Court struck most of Plaintiffs' claims and then determined that one successful claim, school construction, merited an award of fees. *Sinajini*, 47 F. Supp. 2d 1315, 1319, 1323-24 (D. Utah 1999). The Tenth Circuit Court of Appeals held such limitation was "unreasonable because it belies the nature of the settlement process wherein a party might prevail on claims that were previously stricken." *Sinajini*, 233 F.3d at 1240.

The Petition is simply another attempt by the District to try all the claims anew in yet another litigation. However, requiring parties to go back, after a settlement is signed and a consent decree entered, to determine whether claims that have been merged into a final judgment and permanent injunction are meritorious, conflicts with *Farrar*'s prevailing party standards, not to mention common sense. A review of the Consent Decree and the record will suffice. The catalyst test, which applies only to matters settled without a judgment, has no role to play in this case.

The District asserts yet another untenable proposition: that a case can be settled with the entry of a judgment containing specific, enforceable terms which clearly come within *Farrar*'s prevailing-party standards and still the District Court must go back and try the case to determine whether the law has been violated. The District does not explain how this process would work in practice. Nor does the District describe how this procedure would be compatible with Congressional intent in passing the Civil Rights Act. To protect civil rights in this country, there must be enforcement by private parties whose attorneys must be compensated. The Senate Report on 42 U.S.C. § 1988, expressly states "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, 94th Cong., 2d Sess., p. 5 (1976) (quoted in *Maher v. Gagne*, 448 U.S. 122, 129 (1980)); *see also* H.R. Rep. No. 1558, 94th Cong., 2d Sess., p. 7 (1976).[9]

A settlement that is supposed to finish a controversy but which in fact multiplies exponentially with more trials and more appeals certainly conflicts with the intent of Congress to award fees to promote judicial economy.[10] Moreover, the

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9. This is also the position of the United States in a case now under review by this Court, *Buckhannan Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, Supreme Court No. 99-1848. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, 2000 WL 1740742 *2 (2000).

10. The House report on 42 U.S.C. § 1988 specifically states that "[t]he phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." H.R. Rep. No. 1558, *supra*, at 7. "If the litigation (Cont'd)

prospect of endless litigation would violate this Court's admonition that fights over fees should not degenerate into a second major litigation. *Webb v. Board of Educ.*, 471 U.S. 234, 244 n.20 (1985); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). *Sinajini* does not conflict with *Farrar*. Rather, the District's arguments in its Petition fundamentally conflict with *Farrar*. Under these circumstances, review is inappropriate.

III. THE COURT SHOULD NOT HOLD THIS CASE PENDING RESOLUTION OF *BUCKHANNON*.

The District's suggestion that *Sinajini* be held until resolution of a case now before this Court, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, No. 99-1848, has no merit. The *Buckhannon* case presents an entirely different question. In *Buckhannon*, the issue as presented is whether courts should be allowed to use the catalyst test.

Buckhannon raises the question of fees in a manner which is common in catalyst test cases but is not found in *Sinajini*. *Buckhannon* was dismissed as moot, but fees were sought because it was claimed that the lawsuit was a catalyst for action which benefitted plaintiff. Fees were denied because the Fourth Circuit has not adopted the catalyst test. *See Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 203 F.3d 819 (4th Cir. 2000) (attached hereto as Appendix B). This is quite

(Cont'd)
terminates by consent decree, for example, it would be proper to award counsel fees." *Ibid.* "A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." *Ibid.*

unlike *Sinajini* where there is an enforceable judgment in the form of a consent decree. It is, therefore, significant that the Fourth Circuit Court of Appeals acknowledged that *Buckhannon* is distinguishable from cases where judgments, including consent decrees, bestow prevailing party status. *Id.* at 820 (citing *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (en banc, 4th Cir. 1994)).

The resolution of the *Buckhannon* appeal will make no difference to *Sinajini*. If the Court approves of the catalyst test in *Buckhannon*, the ruling will not apply to cases ending in judgments, including consent decrees. These judgments determine prevailing party status by using *Farrar*'s standards. If *Buckhannon* strikes down the catalyst test, the District's defense fails altogether. Either way, nothing will be accomplished by holding *Sinajini* pending a final decision in *Buckhannon*.

CONCLUSION

Based upon the foregoing, the arguments asserted by Petitioner in support of Petition for Writ of Certiorari are without basis. The Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — 1997 ORDER AND CONSENT DECREE AND 1997 AGREEMENT OF PARTIES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED APRIL 24, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 2:74-CV-346-S

JIMMY SINAJINI, *et al.*,

Plaintiffs

and

THE NAVAJO NATION; THE UNITED STATES OF AMERICA, *et al.*,

Plaintiffs-Intervenors,

v.

BOARD OF EDUCATION OF THE SAN JUAN COUNTY SCHOOL DISTRICT, *et al.*,

Defendants.

April 24, 1997

* * *

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SAM, District Judge.

1997 ORDER AND CONSENT DECREE

The Court has reviewed the 1997 Agreement of Parties and has found that relief shall be granted in accordance with it.

It is therefore ORDERED, ADJUDGED, and DECREED:

1. The Court approves and adopts the 1997 Agreement of Parties dated April 24, 1997, which is hereby incorporated by reference into this Order and Decree.

2. The District denies any violation of any state or federal law or any wrongdoing. There has been no judicial determination as to the validity of the claims against the District.

3. The District is hereby generally enjoined from violating the Equal Protection Clause of Fourteenth Amendment, Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 and § 2000d, and its implementing regulations 34 C.F.R. §§ 100 *et. seq.*, and the Equal Education Opportunity Act of 1974, 20 U.S.C. § 1703.

4. The parties and all persons acting in concert or participating with them are hereby ordered to comply with the provisions of the 1997 Agreement of Parties.

5. The Court shall retain jurisdiction over this action pursuant to paragraph 6 of the Agreement of the Parties.

6. The Utah State Board of Education and the individual members of the Board as designated by the original *Sinajini* complaint are hereby dismissed without prejudice, and the current State Board of Education and the State Superintendent of Public Instruction shall be permitted to participate as Amicus Curiae.

7. San Juan County and individual members of the San Juan County Commission are hereby dismissed without prejudice.

1997 AGREEMENT OF PARTIES

The United States; the Navajo Nation; the individual *Sinajini* Plaintiffs, the Plaintiff-Intervenors, and the Plaintiff Class as defined in paragraph 6 below (collectively referred to hereafter as the "*Sinajini* Plaintiffs"); Taylor Chee, Herman Chee, Jr., and Araidena Chee, by and through their parents and general guardians, Herman Chee, Sr., and Julie Chee (collectively referred to hereafter as the "Chees"); the Board of Education of San Juan County School District; and the individually named Defendants, together with the State of Utah, desire, as parties to this and related pending and potential litigation, to resolve this matter by means of this 1997 Agreement of Parties ("1997 Agreement") as set forth below. Accordingly, the parties, through their respective counsel and subject to the approval of this Court, hereby agree as follows:

1. The parties to this agreement are: (1) Board of Education of San Juan County School District (hereafter "District"); (2) the Utah State Board of Education and State

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Superintendent of Public Instruction as Amicus Curiae (hereafter "State"); (3) the Chees; (4) the *Sinajini* Plaintiffs; (5) the Navajo Nation (hereafter "Nation"); and (6) the United States of America (hereafter "United States"). Parties 4-6 are collectively referred to hereafter as parties plaintiff.

2. The parties desire to put the litigation behind them. All prefer to work together cooperatively to identify creative and constructive solutions to the educational issues that exist rather than continue the litigation process. All parties recognize the commitment of all other parties to act reasonably to see that Native American children, as well as all other children residing in San Juan County School District, receive an appropriate education and an equal educational opportunity and acknowledge that their collective, cooperative efforts, rather than litigation, will most likely result in the delivery of such educational services to all District students.

3. Moreover, the parties are interested in utilizing resources, energy, and time on the delivery of quality educational services to District students, and in dealing with educational issues as they exist today and not in resolving disputes about issues that may have occurred over the last twenty (20) years.

4. The pending *Sinajini* case was limited to a determination of the District's compliance with the provisions of the "Agreement of Parties" entered 5 August 1975 ("1975 Agreement") and subsequently approved by the Court and incorporated into a Consent Decree ("1975 Consent Decree").

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5. The 1997 Agreement and corresponding Order and Consent Decree ("1997 Order and Consent Decree") are intended to resolve the dispute concerning compliance with the 1975 Agreement and related issues, including paragraphs 11-16 of the United States' Complaint-in-Intervention filed in this action, the issues raised in the referral dated February 10, 1994 from the Office for Civil Rights, United States Department of Education to the United States Department of Justice concerning the District's compliance with Title VI of the Civil Rights Act of 1964, and the issues raised in the October 31 1996 letter from the United States Department of Justice to the District.

The District denies any violation of any state or federal law or any wrongdoing as alleged above. The parties acknowledge that there has been no judicial determination as to the validity of the claims and defenses raised by the parties as reflected in this paragraph.

6. The parties agree that this action is properly maintained as a class action pursuant to Rules 23(a) and (b)(2) of Federal Rules of Civil Procedure. The class shall consist of present and future Native Americans who are eligible under applicable statutes for educational services from the District. The *Sinajini* Plaintiff Class shall be notified of this settlement as ordered by the Court in approving the 1997 Agreement or as otherwise required by law. This Court shall retain jurisdiction over this matter until such time as the parties agree or the Court determines upon application by any party, that the parties have, or any party has, completed their obligations hereunder, including obligations under paragraph 3 of the 1997 Order and Consent Decree,

Superintendent of Public Instruction as Amicus Curiae (hereafter "State"); (3) the Chees; (4) the *Sinajini* Plaintiffs; (5) the Navajo Nation (hereafter "Nation"); and (6) the United States of America (hereafter "United States"). Parties 4-6 are collectively referred to hereafter as parties plaintiff.

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3. Moreover, the parties are interested in utilizing resources, energy, and time on the delivery of quality educational services to District students, and in dealing with educational issues as they exist today and not in resolving disputes about issues that may have occurred over the last twenty (20) years.

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and that the District has maintained a system of equal educational opportunity for a period of time that will allow the Court to determine that a system of equal educational opportunity will continue.

7. The 1997 Agreement shall be incorporated into and enforced by the 1997 Order and Consent Decree to be entered by the Court.

8. In *Meyers v. Board of Educ.*, 905 F.Supp. 1544 (D.Utah 1995), this Court determined that the District, the State, the United States, and the Nation each has a duty with respect to the education of Native American children residing in the District. The nature and scope of these duties were not fully set forth in the Court's decision. The District expresses its desire and commitment to provide equal educational opportunities to all its students and to maximize the resources available to the District for purposes of funding District programs. The reference to the duties of others should not be interpreted as any attempt to minimize the District's duties and its commitment to the Native American students in its schools, but a recognition of the role others can and should play.

9. The parties hereby agree that given the age of the 1975 Agreement and Consent Decree, the changed circumstances within the District since the date of their execution, and disputes regarding compliance with and the meaning of several provisions of the 1975 Agreement and Consent Decree, the 1975 Agreement and Consent Decree are hereby superseded, dissolved, and replaced by this 1997 Agreement and corresponding Order and Consent Decree.

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PENDING LITIGATION

10. The Chees hereby agree voluntarily to dismiss without prejudice the *Chee* (Case No. 94-C-386-J) case. The parties also agree to stay any further enforcement proceedings in the *Sinajini* matter until such time as the parties have completed their efforts otherwise to resolve disputes as outlined herein. The parties agree that any subsequent proceedings shall be governed by the 1997 Agreement and limited to enforcement of the 1997 Agreement and 1997 Order and Consent Decree and not the 1975 Agreement or 1975 Consent Decree. Legal proceedings shall not be reinstated or commenced by any party until such time as the parties have complied with the dispute resolution provisions of paragraphs 32-34 of this Agreement and all other relevant provisions of the Agreement; provided, however, that disputes raised by the United States shall not be governed by the process established by paragraphs 32-34 of this Agreement until approved plans are in place pursuant to the work of the committees established by paragraph 31.

11. The parties plaintiff shall dismiss without prejudice the State Board of Education and the individually named State Board members as designated in the original *Sinajini* complaint from the *Sinajini* action, provided that the current State Board of Education and the State Superintendent of Public Instruction shall be Amicus Curiae to the 1997 Agreement.

CONSTRUCTION PROJECTS AND FUNDING

12. The District shall hold a bond election in May 1997. The District, the Nation, and the *Sinajini* Plaintiffs shall use

their best efforts to maximize the prospects of the voters of San Juan County authorizing the issuance of the bonds. The District's best efforts shall comply with and be limited by Utah law. If the issuance of bonds is approved in that election, portions of the proceeds therefrom shall be used to add additional permanent classroom facilities at Whitehorse High School; Monument Valley High School shall also be improved by expanding the existing library facilities and adding additional classroom facilities. Nothing in this Agreement shall require the District to use all proceeds from the May 1997 bond election, if approved, on projects mentioned herein or at Navajo Mountain.

13. If the voters of San Juan County fail to authorize the issuance of bonds in the May 1997 election, (1) the building projects identified in paragraph 12, to be built from bond funds, will revert to projects considered from district pay-as-you-go resources and will be subject to prioritization by the Board and the availability of funds; and (2) the construction of the permanent secondary facility at Navajo Mountain will continue to be governed by paragraph 7(a)(1) of the Agreement of Parties in *Meyers v. Board of Education,* Civil No. 93-C-1080J.

14. Regardless of whether the voters authorize the issuance of bonds in the May 1997 election, the parties to this Agreement, other than the United States and to the extent allowed by law, shall use their best efforts to obtain finding from Congress and appropriate federal or state agencies for (1) the construction of an elementary school at Monument Valley sufficient in size to accommodate Arizona and Utah students residing in the Monument Valley/Oljato areas;

(2) additional construction funding to provide space for Arizona students at the high school at Navajo Mountain; and (3) the development of a sufficient water source at Navajo Mountain fully to meet the needs of the schools and community. All parties acknowledge, however, that without substantial financial contributions from the United States, the Nation, or the State of Arizona, including its school districts, or any combination of those entities, the facilities at Navajo Mountain and potential elementary facility at Monument Valley shall be designed to accommodate only the Utah student population. If an elementary school is constructed at Monument Valley, the District shall also use its best efforts to continue to operate the Mexican Hat Elementary School if educationally and financially feasible. The District agrees to make available to Arizona students all reasonably available space, if any, in the temporary and permanent facilities to be constructed at Navajo Mountain and the potential elementary facility at Monument Valley. If within a reasonable time, not less than 24 months nor greater than 36 months, funds for the construction projects identified in this paragraph have not been obtained from other sources, including but not limited to the State of Utah, the Navajo Nation, and the United States, the Plaintiffs retain the right to pursue relief in court after compliance with the provisions of paragraphs 32-34 of this Agreement.

15. The Navajo Nation agrees to use its best efforts to provide water and power at reduced rates for the Mexican Hat and potential Monument Valley elementary schools, so as to offset the utility related expenses of operating two schools as opposed to one.

16. If the effort to secure federal funds or other revenue for the purpose of constructing an elementary school at Monument Valley is not successful, the parties retain the right to pursue legal action relative to the construction of an elementary school at Monument Valley after compliance with paragraphs 32-34 of this Agreement. Nothing in this Agreement shall be construed as imposing any duty or obligation to construct an elementary school at Monument Valley on the District, the State, the Nation, or the United States, that does not exist under current federal, state, or tribal law. The parties hereto agree that no statements, representations, positions, opinions, documents, discussions, minutes or other potential evidentiary items generated by any party after the execution of this Agreement in connection with the effort to secure federal funding for an elementary facility at Monument Valley shall be used in any subsequent legal proceedings of any type. Such items shall be considered evidence of conduct or statements made in compromise negotiations.

BILINGUAL EDUCATION

17. The District shall administer and provide an appropriate educational program for students who are limited English proficient ("LEP") as required by applicable statutes and regulations. In formulating a bilingual or LEP program the District shall take into account the spirit and provisions of paragraphs 33 and 34 of the 1975 Agreement and the large traditional Navajo population in the District.

18. The District and the other parties shall establish a bilingual education committee of at least two and no more

than six members to review the District's existing bilingual program. The "bilingual committee" shall be established and function pursuant to paragraph 31 of this Agreement.

19. The bilingual committee established pursuant to paragraphs 18 and 31 shall, in a constructive, collegial, and cooperative effort, review the District's existing bilingual program and determine whether it is acceptable to the parties. If the plan as written is deemed acceptable, the bilingual committee shall agree upon it as outlined in paragraph 31. The plan shall contain express provisions for an implementation timetable and provide for monitoring and evaluation. The bilingual committee may, if deemed necessary and advisable by a majority of the committee, recommend revisions to the District's existing bilingual program.

20. The District shall also use its best efforts to recruit, hire, provide in-service training to, and retain teachers and teachers' aides certified or trained in bilingual education for the appropriate language group. The parties recognize the difficulties in hiring such personnel because of the limited pool of such personnel.

21. If an "approved plan" is established pursuant to paragraph 31(e) of this Agreement, and if prior to a declaration of compliance pursuant to paragraph 6 of this Agreement the District intends substantially to revise the approved bilingual program or any of its elements, including but not limited to the method for identifying LEP students, the method or methods of instruction, the teacher training program, or the monitoring or evaluation plan, the District

shall hold public hearings prior to approving or adopting any substantial change in the approved plan. Such hearings shall be conducted in regular board meetings noticed as provided by law. Specific written notice shall be provided at least thirty (30) days prior to the hearing to the Attorney General of the Navajo Nation, to the Navajo Nation Division of Education, to the United States, and to *Sinajini* Plaintiff Class counsel.

22. If the process set forth in paragraphs 17-21, and 31 does not result in an approved bilingual plan, the District will continue to use and implement the plan currently in use by the District with appropriate modifications and adjustments as the District deems necessary. All parties shall retain the right to pursue relief in court after compliance with the provisions of paragraphs 32-34 of this Agreement; provided, however, that the United States shall not be required to comply with the provisions of paragraph 32-34 with respect to relief sought pursuant to this paragraph.

CULTURAL AWARENESS PROGRAM

23. The District agrees to continue to incorporate a Native American cultural awareness component into its curriculum and to formulate a more formal cultural awareness plan. The District shall seek the assistance of the Navajo Nation through its Division of Education and the San Juan County Navajo community in formulating a cultural awareness plan.

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SPECIAL EDUCATION

24. In conjunction with the State, the District shall provide and administer a special education program as required by applicable state and federal statutes and regulations. Nothing in this Agreement is intended to create additional rights or limit the rights and obligations of any party or individual under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, and the rules and regulations of the State of Utah and federal agencies promulgated pursuant thereto.

25. The District and the parties plaintiff shall establish a "Special Education Committee" of at least two and no more than six members. The committee shall be established and function pursuant to paragraph 31 of this Agreement.

26. The special education committee shall review the District's special education program and, if necessary, suggest revisions to the District-wide program. If an approved District special education plan is not established, pursuant to paragraph 31, the District shall establish and adopt a formal plan, and all other parties shall retain their rights to pursue relief in court after compliance with the provisions of paragraphs 32-34 of this Agreement; provided, however, that the United States shall not be required to comply with the provisions of paragraphs 32-34 with respect to relief sought pursuant to this paragraph.

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ACCOUNTING PROCEDURES AND EXPENDITURES

27. The District and the parties plaintiff shall each designate one individual to work together in a cooperative effort with the District Business Administrator to make the District's financial information and records more understandable to the public. The District, through its Board of Education, shall consider and, in its sole discretion, implement appropriate policies or procedures, consistent with existing state law and regulations, pursuant to the recommendations that result from this effort.

CURRICULUM

28. The District shall provide and administer a curriculum consistent with applicable statutes and regulations. The parties recognize that allocation of resources and student demands play an important role in curriculum offerings in the District. With this understanding, the District shall make educational programs available so that all students are offered an equal educational opportunity and shall use its best efforts to provide equal access to educational services and courses that are substantially similar, considering the unique circumstances of each District facility and individual community needs.

29. The District and the other parties shall establish a Curriculum Committee of at least two and not more than six members. This committee shall review the curriculum offered in the District and make recommendations for revisions to District curriculum if necessary. The curriculum committee shall be established and function pursuant to paragraph 31 of this Agreement.

30. If the Curriculum Committee and the parties cannot establish an approved curriculum plan pursuant to paragraph 31, the parties shall retain the right to pursue relief in court after compliance with the provisions of paragraphs 32-34 of this Agreement.

COMMITTEE CREATION AND DEADLINES

31. The parties recognize that this 1997 Agreement will be of little real and lasting benefit in advancing District programs and educational efforts if an atmosphere does not exist that allows full, frank, and unfettered exchange of ideas, information, and opinions among the individuals that will be involved in reviewing District programs. In an effort to establish an atmosphere most conducive to the improvement of educational programs, the parties agree to the following framework for the functioning of the referenced three committees. The Bilingual, Special Education, and Curriculum Committees shall be established and operate according to the following guidelines:

(a) The number of individuals to serve on each committee shall be determined by the parties consistent with the provisions of paragraphs 18, 25, and 29, but shall be an even number.

(b) The District shall appoint half of each such committee, and the parties plaintiff shall appoint half of the individuals to serve on each committee by a process to be determined solely by them. The parties shall agree in writing as to the number of individuals to serve on each committee by 15 May 1997. The parties shall then

designate in writing the individuals to serve on each such committee by 1 June 1997. The District shall designate an individual to serve as the chairperson of each committee. The District designee shall be responsible to organize, coordinate, and schedule the meetings and other work of each committee, unless and until a different chairman is selected by the Committee.

(c) Each committee shall use its best efforts to complete a "committee plan" as defined by subparagraph 31(e) by 1 September 1997, and in any event shall complete its work by 2 January 1998, unless the parties mutually agree to the extension of such deadlines for one or more of the committees.

(d) The District and the other parties shall, if necessary, each compensate their own designees serving on each committee.

(e) Each committee shall, if possible, agree to a recommended plan of action for the District in its respective area by a vote of at least a simple majority (51% or more) of its members. A plan so approved by a committee shall be referred to as a "committee plan." Each committee plan shall be submitted to the Board of Education of San Juan County School District, the Navajo Nation, the United States, and to the *Sinajini* Plaintiff class through their counsel. The Board shall have authority to hold public meetings to review committee plans. The Board may reject or approve each committee plan or any part thereof. If the Board rejects a committee plan, or any part thereof, the plan shall not

be binding on the District. The United States, *Sinajini* Plaintiff class, and the Navajo Nation shall also have the right to approve or reject any committee plan. Only committee plans approved by all parties shall be "*approved plans* " binding on the parties hereto.

(f) Failure to reach an approved plan by 15 March 1998 in any area shall allow the parties or any of them to seek relief through the courts after compliance with the provisions of paragraphs 32-34 of this Agreement for each issue for which an approved plan has not been reached, unless all the parties agree in writing to an extension of such deadlines for any committee or committees; provided, however, that the United States shall not be required to comply with the provisions of paragraph 32-34 with respect to relief sought pursuant to this paragraph. Unless expressly set forth herein, nothing in this 1997 Agreement shall be construed to preclude the Board of Education or designated District personnel, separate and apart from any of the committees, from developing, improving, or implementing any District program or plan. All plans shall comply with all applicable laws.

DISPUTE RESOLUTION PROCESS

32. As an important aid to achieving the goal that educational resources be utilized in educational endeavors and not to fund further litigation and also recognizing that the litigation process often destroys the cooperative spirit that must exist among those responsible for and most interested in the educational process in the District, the parties hereby agree to the following dispute resolution process.

Appendix A

33. A Dispute Resolution Team ("Resolution Team") shall be established. The Resolution Team shall consist of six members, three of which shall be designated by the District, and three of which shall be designated by the parties plaintiff. The District and the parties plaintiff shall identify in writing the individuals to serve on the Resolution Team no later than 1 September 1997. Compensation, if any, to be paid to such members shall be paid by the respective entity designating the individual to be remunerated. The District shall designate an individual to serve as chairperson of the Resolution Team. An official address for contacting the team shall be established, as well as a method for timely notification of all Team members.

34. No action shall be taken in any court by any party concerning any issue which is the subject of this Agreement until there is compliance with this paragraph; provided, however, that disputes raised by the United States shall not be governed by the process established by paragraphs 32-34 of this Agreement until approved plans are in place pursuant to the work of the committees established by paragraph 31. Any complaint, concern, dispute or other disagreement between parties to this Agreement shall be submitted in writing to the Resolution Team.[1] Nothing in this paragraph shall supersede the terms of those certain leases between the Navajo Nation and the Board of Education of the San Juan School District entitled "Lease Agreement for 9-12 School Building" and "Lease Agreement for District Housing" at Navajo Mountain. The Resolution Team shall have thirty

1. Nothing in this Agreement shall relieve any party of its obligations or affect the process to be followed to resolve a dispute arising under Individuals with Disabilities Education Act.

(30) days to hold a hearing or meeting or otherwise confer, and, absent extraordinary circumstances, thirty (30) additional days to make recommendations, including where necessary to the Board of Education, on any issue. Each party shall have the right to accept or reject the recommendation. If the Resolution Team fails to make a written recommendation for action within sixty (60) days, absent extraordinary circumstances, or if any party to a dispute submitted to the Resolution Team rejects the recommendation, all parties shall be free to pursue relief in court regarding the specific matter raised. If a party fails to accept a recommendation in writing within thirty (30) days of receipt thereof, it shall be deemed rejected.

CONTINUING COOPERATION AND MISCELLANEOUS PROVISIONS

35. The parties hereby agree that adoption of this 1997 Agreement will not result in a comprehensive and lasting settlement unless the implementation efforts provided herein are successful. The parties acknowledge the importance that the participants in the implementation efforts be free, to the maximum extent attainable, to participate in an atmosphere of full and complete interchange, without concern of fear that whatever is done or said will be used in subsequent court proceedings if settlement does not result. To promote this atmosphere, the parties agree that acts done and statements made in attempting to develop settlement plans or obtain construction funds shall not be admissible in evidence in subsequent court proceedings. Further, where the settlement process requires the designation of individuals to work together in committees in an attempt to work out an

acceptable settlement each party should have wide latitude in designating the individuals to participate on behalf of the designating party. Such designated committee members, if later called as expert witnesses, may not refer to statements made, acts done, or documents obtained by or from other parties during the cooperative efforts described in this document.

36. The parties shall negotiate agreements concerning costs and attorneys fees in connection with the *Chee* and *Sinajini* litigation and the pending United States' matters as identified in paragraph 5 above. If they are unable to reach an agreement, any party may file and serve an appropriate motion for costs and attorneys fees by July 1, 1997, and the matter shall be submitted to the Court for resolution after appropriate briefing and any further proceedings deemed necessary by the Court. This provision shall not be viewed as any indication that fees are or are not due in this matter.

37. The District agrees to use its best efforts, upon appropriate, reasonable written request, to provide any party with information relating to compliance with this 1997 Agreement. Any objection to such a request shall be in writing within twenty (20) days of receipt of such request.

38. Any of the provisions of this Agreement may be amended by mutual agreement of the parties or upon a showing to the court that the circumstances underlying any particular provision have changed substantially. Such requests shall be made in writing to all parties. If after a reasonable time not to exceed thirty (30) days, the parties have not agreed to an amendment, the requesting party shall be free to file a motion with the Court requesting a change in the Agreement.

Appendix A

39. If any provision of this Agreement is deemed unenforceable by the Court for any reason, it shall not affect the enforceability of any other provision hereof.

40. The State, as Amicus Curiae, agrees to use reasonable efforts according to applicable law to monitor the District's educational efforts in the areas of bilingual education, special education, and curriculum.

41. The parties acknowledge that this Agreement is the product of negotiation and represents a good faith settlement of disputed issues. Nothing in this Agreement should be construed as an admission or acknowledgment in any way that the District has not complied with the provisions of the 1975 Agreement and the Consent Decree or that the District is not in compliance with existing state or federal law in any regard.

42. This Agreement constitutes the complete agreement between the parties. It has been reached in arm's length negotiations. All parties have had the opportunity to review it, comment on its provisions, change provisions as desired, and otherwise participate in its preparation.

APPENDIX B — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *BUCKHANNON BD. AND CARE HOME, INC., et al. v. WEST VIRGINIA DEPT. OF HEALTH AND HUMAN RESOURCES, et al.*, NO. 99-1424 DATED AND DECIDED JANUARY 20, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1424

BUCKHANNON BOARD AND CARE HOME, INCORPORATED; The West Virginia Residential Board and Care Home Association; Dorsey Pierce, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

ALMOST HOME, INCORPORATED; Daisy Layman, by her next friend, Faye Byers,

Plaintiffs,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; Gretchen O. Lewis, Secretary, West Virginia Department of Health and Human Resources; Office of Health Facility Licensure and Certification; Nancy Tyler, Director, Office of Health Facility Licensure and Certification; Sandra L. Daubman, Program Manager, Office

of Health Facility Licensure and Certification; West Virginia Office of the State Fire Marshal; Walter Smittle, Fire Marshal; Gaston Caperton, in his official capacity as Governor of the State of West Virginia; State of West Virginia; West Virginia State Fire Commission; John Beaty, II, Commissioner; Joseph J. Bostar, III, Commissioner; Randy Breeden, Commissioner; James W. Fife, Commissioner; Francis A. Guffey, II, Commissioner; Daniel Hess, Commissioner; Gregory Alan Lay, Commissioner; David L. Tolliver, Commissioner; Stephen C. Mcbee, Commissioner; Bill L. Spencer, Commissioner; Victor Stallard, Jr., Commissioner; J.D. Waggoner, Commissioner; Kenneth Morgan, Commissioner; Joan E. Ohl, Secretary, Department of Health and Human Resources; John Wilkenson, Director, Office of Health Facility Licensure and Certification; Cecil H. Underwood, Governor, State of West Virginia,

Defendants-Appellees,

and

West Virginia State Board of Examiners for Registered Professional Nurses; Laura S. Rhodes, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses,

Defendants.

Argued Dec. 2, 1999.
Decided Jan. 20, 2000.

Appendix B

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Frederick P. Stamp, Jr., Chief District Judge. (CA-96-106-2).

* * *

Before NIEMEYER and MOTZ, Circuit Judges, and BUTZNER, Senior Circuit Judge.

OPINION

PER CURIAM.

The appellants in this case ask us to reexamine our holding in *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir.1994) (*en banc*), which rejected the catalyst theory when determining whether to award attorneys fees under federal statutes making fees awardable to prevailing parties. As a three-judge panel of the court, however, we are bound by our precedent. *See Joseph v. Angelone*, 184 F.3d 320, 324-25 (4th Cir.1999). Accordingly, we affirm the judgment of the district court that relied on *S-1 and S-2* in denying appellants' motion for attorneys fees.

Buckhannon Board and Care Home, Inc. ("Buckhannon"), which operates residential care homes for elderly people who require some assistance in the activities of daily living, failed an inspection by the West Virginia Office of the State Fire Marshal because it housed residents incapable of self-preservation, in violation of West Virginia law. *See* W.Va.Code § 16-5H-2 (1998) (requiring that all residents of residential board and care homes be capable of

self-preservation). Buckhannon and other plaintiffs commenced this action for a declaratory judgment that the state law violated the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

While the action was pending, West Virginia amended state law to delete the self-preservation requirement. None of the defendants, however, informed the plaintiffs or the court of the pending amendments. Indeed, the district court noted that the defendants did not even inform their own attorney, who was representing them in this action. As a result of the amendments, this action became moot, and the district court dismissed it.

Although Buckhannon did not obtain the change in state law through an enforceable judgment, consent decree, or settlement, it claimed nevertheless that it was the prevailing party entitled to attorneys fees under the FHAA and the ADA. *See* 42 U.S.C. § 3613(c)(2); 42 U.S.C. § 12205. Buckhannon argued that under a catalyst theory, it obtained the relief it sought through the defendants' voluntary conduct because it filed this action and brought to the state's attention the flaws in its law. The district court observed that if the catalyst theory were available in this circuit, the plaintiffs "might prevail." However, because this circuit had rejected the catalyst theory in *S-1 and S-2*, the district court denied the plaintiffs' motion for attorneys fees.

On this appeal, the appellants challenge "only the district court's ruling on the disallowance of attorneys fees and costs under the 'catalyst theory.' " They urge us to reexamine our

decision in *S-1 and S-2*, which, they acknowledge, would, if applied, require rejection of their appeal.

The Fourth Circuit has determined that panels of the court are bound by the prior decisions of the court, *en banc* or in panel, and that binding precedent can be reversed only by the court *en banc*. *See Joseph*, 184 F.3d at 325 ("As a panel, we are not authorized to reconsider an *en banc* holding even if we happen to be so inclined, which we are not"); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir.1990) ("[A] panel considers itself bound by the prior decision of another panel, absent an *in banc* overruling or a superseding contrary decision of the Supreme Court").

In *S-1 and S-2*, we held that in order to qualify as a "prevailing party" in litigation, the plaintiff must, through the litigation, " 'obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement.' " *S-1 and S-2 v. State Board of Education of North Carolina*, 6 F.3d 160, 168 (4th Cir.1993) (Wilkinson, J., dissenting) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)), *vacated*, 21 F.3d 49 (1994) (*en banc*) (adopting Judge Wilkinson's dissent as the majority opinion). Because the plaintiffs did not bring about the change in West Virginia law through any judgment, decree, or settlement, we conclude that the district court properly applied *S-1 and S-2* to this case. Accordingly, the judgment of the district court is

AFFIRMED.

Supreme Court, U.S.
FILED
MAY 29 2001
CLERK

No. 00-1596

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE
SAN JUAN SCHOOL DISTRICT,

Petitioner,

v.

JIMMY SINAJINI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

Whether a settlement agreement and consent decree automatically make the plaintiffs prevailing parties under 42 U.S.C. § 1988 merely because the agreement and decree modify the defendant's behavior in ways that benefit the plaintiffs, irrespective of whether the plaintiffs obtained actual relief on the merits of their claims.

Although a reply is typically unnecessary at the certiorari petition stage, it is necessary in this case to clarify two points on which respondents have created significant confusion.

I.

THE ISSUE IS NOT THE CATALYST TEST BUT RATHER THE BROADER QUESTION OF WHETHER AN AWARD OF ATTORNEYS FEES REQUIRES THAT PLAINTIFFS OBTAIN ACTUAL RELIEF ON A MERITORIOUS CLAIM.

Respondents recast the question presented as whether the catalyst test controls this case (Resp. *i*), and then argue that it does not because "the catalyst test does not apply" to cases involving consent decrees and settlement agreements. Resp. 4-5. However, the issue presented sweeps much more broadly than respondents' cramped reformulation.

At the outset, respondents are plainly wrong in their sweeping assertion that catalyst-test principles do not apply to cases involving a consent decree or settlement agreement. The catalyst test has indeed been applied in consent decree cases. One of the first catalyst-test cases — indeed, the very case from which the Tenth Circuit drew its own catalyst test — was a consent decree case. *See Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *see also J&J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1472-73 (10th Cir. 1985) (adopting *Nadeau* catalyst test).

The catalyst test in its various forms is simply a reflection of the broader rule, repeatedly affirmed in numerous decisions of this Court, that attorneys fees under 42 U.S.C. § 1988 may be awarded only when a plaintiff has advanced

a meritorious civil rights claim. *See Hewett v. Helms*, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail" under section 1988); *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (per curiam) (attorney's fees provisions "permit the award of counsel fees only to a party who has prevailed on the merits of a claim"); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) ("when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law"). That is the essence of the holding in *Farrar v. Hobby*, 506 U.S. 103 (1992), where the Court ruled that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some *relief on the merits of his claim*." *Id.* at 111 (emphasis added). As the Chief Justice has underscored, a plaintiff is entitled to an award of attorney's fees only if his suit had legal merit:

> It is clear beyond per-adventure that unless an action brought by a private litigant contains some basis in law for the benefits ultimately received by that litigant, the litigant cannot be said to have "enforced" the civil rights laws or to have promoted their policies for the benefit of the public at large.

Long v. Bonnes, 455 U.S. 961, 966-67 (1982) (Rehnquist, J., dissenting from denial of certiorari).

It is of course true, as respondents (Resp. 4-5) and the court below (Pet. App. 7a-8a) have noted, that in their various formulations of the catalyst test the courts of appeals have included a requirement that before attorney's fees may be awarded the plaintiff must demonstrate that his claims had

at least some merit.[1] But that is only because such a requirement must always be met — in any context — for a plaintiff to qualify for attorney's fees. Otherwise nuisance settlements would render the plaintiff a prevailing party entitled to attorney's fees even where the plaintiff's claims were clearly frivolous — an outcome never intended by Congress nor contemplated by past decisions of this Court.

The court below dispensed with this essential requirement and instead held that if there is a settlement agreement or consent decree modifying the defendant's behavior so as to benefit the plaintiff in any way, then the plaintiff has automatically prevailed — whether or not such relief was sought by the plaintiff in the pleadings or was in any way required by law. Pet. App. 8a. Since almost by definition every settlement agreement or consent decree benefits the plaintiff in at least some way, the effect of the decision below is that attorney's fees have become automatic in cases involving settlement agreements or consent decrees. This creates a clear conflict with *Farrar* and the entire basis for attorney's fees under section 1988.

It also creates a conflict among the circuits. As noted in the petition, the Eighth Circuit in *Warner v. Independent School District No. 625*, 134 F.3d 1333 (8th Cir. 1998), rejected the very sort of "benefit to plaintiff equals entitlement to attorney's fees" reading of *Farrar* which the Tenth Circuit has adopted in the context of settlement agreements and consent decrees.

---

1. *See, e.g., Zinn v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994) ("the plaintiffs' claims, if pressed, cannot have been frivolous, unreasonable, or groundless"); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. 1*, 17 F.3d 260, 262 (8th Cir. 1994) (same); *Pembroke v. Wood County*, 981 F.2d 225, 230-31 (5th Cir.) (same), *cert denied*, 508 U.S. 973 (1993).

II.

RESOLUTION OF BUCKHANNON WILL ADDRESS THE BASIC ISSUE OF THIS CASE.

Respondents contend that the Court should not hold this case pending resolution of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, No. 99-1848, because that case addresses an "entirely different question." Resp. 18. Respondents are seriously mistaken. As stated by the Solicitor General, the question presented in *Buckhannon* is:

> Whether a plaintiff may recover attorney's fees under federal statutes making attorney's fees available to a prevailing party when, as a result of the plaintiff's suit, the defendant voluntarily provides the plaintiff with requested relief.

Brief for the United States as Amicus Curiae Supporting Petitioners, 2000 WL 1740742 *I (2000).

The answer to that question will bear directly on whether attorney's fees are available in this case, where the District voluntarily, *i.e.*, without being required by law, provided respondents with relief (most of which they had not even requested) in order to put an end to frivolous but burdensome litigation. It is noteworthy that the Solicitor General has proposed the following rule in *Buckhannon*:

> The district court's determination [of whether petitioners qualify as "prevailing parties"] should be guided by three central considerations: (1) *whether petitioners' complaint had legal*

> *merit*; (2) whether petitioners received actual relief that redressed their grievances; and (3) whether petitioners' lawsuit played a substantial role in inducing respondents to change their ways.

Id. at *7 (emphasis added). Should this Court adopt such a rule for cases where there has been no final adjudication on the merits, then the standard employed by the district court in this case was correct and the decision below reversing the district court for applying the wrong standard was in error. The Court's resolution of *Buckhannon* is very likely to control the outcome of this case.

CONCLUSION

For the reasons stated here and in the petition for certiorari, petitioner respectfully requests that a writ of certiorari be granted. In the alternative, petitioner respectfully requests that the Court hold this case pending resolution of *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, No. 99-1848.

Respectfully submitted,

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